JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. The district court entered judgment on all parties' claims on December 2, 2015. It amended and made its judgment final on April 5, 2016. Appellant Wright Medical Technology, Inc. filed a timely appeal on April 30, 2016. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. [Omitted]

II. Did the district court abuse its discretion by accepting a second verdict that not only increased punitive damages by over $7.5 million, but also was likely tainted by the Court's post-verdict instructions?

STATEMENT OF FACTS

Appellant Wright Medical Technology Inc. manufactures a hip replacement device that was implanted into appellee Robyn Christiansen to help her regain movement in her hip. *Wright Medical Tech. Inc. v. Christiansen*, 178 F.Supp.3d 1321, 1328 (N.D.Ga. 20160). Christiansen subsequently brought suit against Wright Medical, alleging theories of design defect, fraudulent misrepresentation, fraudulent concealment and negligent misrepresentation. *Id*.

I. The Original Verdict

Following the trial, the Original Verdict Form was submitted to the jury. *Id.* at 1329. Both parties' counsel and the judge agreed to The Original Verdict Form. *Id*. On the Original Verdict Form, instructions to the jury followed each question.

Question 1A of the form asked:

> Do you find by a preponderance of the evidence that Wright Medical's hip replacement device was defectively designed?
>
> This was followed by a "Yes" and "No" prompt.

Question 1A was followed by an instruction, stating:

> If you answered NO to Question 1A, stop, and sign and date this form. If you answered YES to Question 1A, proceed to Question 1B. (Verdict ("Original"), attached as Ex. 1A, at 1-7).

The instructions were intended to terminate jury deliberations if the jury found no design defect. Without a finding of design defect, subsequent questions on the Original Verdict Form were moot. A finding of design defect was a prerequisite to the success of Christiansen's claim.

The jury did not indicate to the court that it had any questions or confusions regarding the Original Verdict Form during its deliberation. (Friday Afternoon November 20, 2015 Transcript ("Nov. 20 Afternoon"), 1518:1-24). After a full day of deliberation, the jury notified the court that it had reached a final decision. *Id*. The court reviewed the completed Original Verdict Form, announced that it

was in "proper form," and instructed a courtroom deputy to read the verdict. *Id*. at 1519:5-20.

However the court stopped the verdict's production after the jury's answer of "No" to Question 1A was read aloud. *Id*. at 1519:5-20. The jury had proceeded to complete the Original Verdict Form despite the instruction to "Stop" after responding "No" to Question 1A. (Original, 1-7). The jury indicated "No" to Questions 1B-1F, finding no defect in the device. *Id*. at 2-3. It also indicated "No" to Questions 2A-24A, finding no fraudulent misrepresentation. *Id*. at 3-4. Yet the jury found Wright Medical was 21.24 percent at fault for causing the harm. *Id*. at 2-3. The jury awarded Christiansen $662,500 in compensatory damages and $2.5 million in punitive damages based on negligent misrepresentation. *Id*. at 4,6.

II. Resubmission and Deliberation Leading to Second Verdict

After Question 1A was read aloud, the court abruptly instructed the jury to "take the form back into the jury room, and please carefully read the instructions that are given to you after – beginning on page one and reevaluate whether you have properly filled out the form." (Nov. 20 Afternoon, at 1519:5-20). The jury subsequently expressed confusion to the court. *Id*. at 1525:23-25. The court then provided the jury a second verdict form to complete. *Id*. Wright Medical's counsel promptly objected to the second form and motioned for the court to accept the

Original Verdict Form. *Id*. at 1524:5-20. The court, however, denied Wright Medical's motion and continued with the resubmitted verdict. *Id*.

While the jury took two days to reach a second verdict, jurors admitted that deliberation was stagnant. *Id.* at 1609:1-25. Jurors reported difficulty in persuading one juror, Juror Burden, in finding Wright Medical liable. (Nov. 24 Afternoon, 1600: 5-19). Before the court, Juror Burden stated that he agreed with and understood the law in this case. *Id*. at 1603:16-25, 1604:1-13. He told the court that he would not "hurry up or come on with it" in response to his peers' efforts to pressure him into finding liability and was not able to follow some instructions because he believed that doing so would lead to the wrong result. *Id.* at 1604: 5-13, 1610: 4-10. Nevertheless, Juror Burden was dismissed on the grounds that he refused to follow instructions. *Id*. at 1611: 15-20. Within thirty minutes after Juror Burden was discharged – the end of the day before Thanksgiving Eve – the jury produced its second verdict. (Nov. 24 Evening, 1619:1-1-23).

III. The Second Verdict

The jury's second verdict differed substantially from its original determinations. The jury indicated that Wright Medical was liable for defectively designing its device, and assigned $550,000 in compensatory damages and $10 million in punitive damages. (Verdict, dated Nov. 24, 1015 ("Final"), at 2, 6). It additionally found Wright Medical wholly at fault for Christiansen's injuries. *Id*. at

4. While it did not find Wright Medical liable for either fraudulent misrepresentation or fraudulent concealment, it found the company liable for negligent misrepresentation and awarded $450,000 in additional damages on this basis. *Id*. at 3-5.

Wright Medical subsequently filed Renewed Motion for Judgment as a Matter of Law or, alternatively, Motion for a New Trial. *Christiansen*,178 F.Supp.3d at 1336, 1339. The district court denied Wright Medical's post-trial motion and Wright Medical appeals the decision to this Court. *Id*.

STATEMENT OF CASE

[Issue concerning Rule 49 of F.R.C.P. omitted]

Alternatively, Wright Medical is entitled to a new trial because the district court abused its discretion by accepting a second verdict that is irreconcilable with the jury's original verdict. The district court maintained that inconsistencies between the original and second verdicts are the result of unbiased deliberations. However, precedent holds that a court cannot accept one verdict over another when disparities across verdicts cannot be plausibly reconciled. Here, there is no plausible explanation for the second verdict's over $7.5 million increased damages, other than perhaps intent to assign damages against Wright Medical. Although the jury took two days to re-deliberate, it reached a decision within hours after one dissident juror was removed. The enormous disparity between the verdicts'

findings of damages is not only irreconcilable, but suggests that the jury impermissibly used the verdict as a means to an end.

Additionally, the district court abused its discretion by halting production of the original verdict after the jury's answer to Question 1A was read aloud, signaling to the jury that its answer to Question 1A was wrong. The district court maintained that it was authorized to stop the Original Verdict Form's production and instruct the jury in an impartial manner. However, persuasive precedent holds that a judge's post-verdict jury instruction entail a substantial risk of coercion. By halting the verdict's announcement after the jury's answer to Question 1A was read, the district court judge likely coerced the jury.

ARGUMENT

[Section I omitted]

II. WRIGHT MEDICAL IS ENTITLED TO A NEW TRIAL BECAUSE THE VERDICT FORMS WERE IRRECONCILABLE, AND THE DISTRICT COURT COERCED THE JURY THROUGH ITS POST-VERDICT INSTRUCTIONS.

A. The district court was not permitted to accept the second verdict because the verdicts cannot be fairly reconciled.

Wright Medical is entitled to a new trial because the district court was prohibited from entering judgment upon a second verdict that cannot be rationally reconciled with the original verdict. While discrepancy across verdicts may reflect a jury's correction of past mistake, inconsistencies that cannot be fairly reconciled

suggest an improper jury deliberation process. Riley v. K Mart Corp., 864 F.2d 1049, 1055 (3d Cir. 1988). A new trial is mandated where inconsistencies across verdicts cannot be fairly reconciled or otherwise evince a jury's attempt to use the verdict as a means to an end. *Id.*

Riley v. K Mart Corp., a persuasive Third Circuit case, established that there is no legitimate way to reconcile a jury's change in its determination of liability as well as quantum of damages. In *Riley*, the resubmitted verdict contradicted the original form by assigning defendant liability and decreasing damages from $250,000 to $150,000. *Id.* There, the Third Circuit remanded the case for new trial, concluding that there could be no principled way to reconcile the verdicts, since there was no way of judging which, if either, verdicts was more reasonable. *Id*. at 1054. While a jury's clarified understanding of the verdict form may produce discrepancies across verdicts, it does not plausibly explain inconsistent findings of liability as well as damages.

A conflicting second verdict, moreover, cannot be accepted when facts suggest that the jury's findings were a means to an end. Where otherwise inconsistent verdicts indicate a fixed desire to assign damages to plaintiff, a court lacks discretion to accept a second verdict. In *Riley*, the Third Circuit concluded that the jury tailored its liability findings to assign damages by producing a second verdict that newly assigned liability and decreased damages within minutes of

deliberation. *Id.* at 1054. Prompt attribution of liability paired with modification of damages strongly suggests a jury's attempt to manipulate a verdict to allow for recovery. *Contrast, Duk v. MGM Grand Hotel Inc*, 320 F.3d 1052 (9th Cir. 2003) (holding that a court does not abuse its discretion by accepting a second verdict altering only liability, as a jury may clarify its understanding of liability). A second verdict is likely a product of improper jury manipulation where consistencies between verdicts indicate a jury's intent to assign damages to plaintiff.

Here, the original and second verdicts are fundamentally inconsistent as no plausible theory can explain why the jury altered its assignment of liability and astronomically increased its assignment of damages. The jury's task here was not complex and the verdicts' formats were substantially similar. (Original, 1-7; Final, 1-7). Yet the jury produced two fundamentally different verdicts. The original verdict indicated no design defect and assigned $2.5 million in punitive damages. However, the second form assigned liability and $10 million in punitive damages. (Original, 1-2, 6; Final, 1-2, 6).

A jury's clarified understanding of a verdict form cannot plausibly explain an increase of over $7.5 million in damages across the verdicts. Even if the jury originally intended to conclude design defect, there is no reasonable explanation as to why the second verdict increased punitive damages by four folds. (Original, 2, 6; Final, 2, 6). Like the Third Circuit in *Riley*, this Court should conclude that the

district court had no rational basis for accepting a second verdict that inexplicably altered its assignment of liability as well as amount in damages.

Moreover, this Court must issue a new trial because the record indicates that the jury improperly treated the second verdict as a means of assigning damages to Christiansen. The record shows that the jury's second deliberation entailed minimal reconsideration of the original verdict. Over the course of the deliberations, jurors re-affirmed to the court that deliberations were in fact stagnant (Nov. 24 Afternoon, 1595:3-8). Juror Burden, attested that there was a lack of proper deliberation across the two days. *Id*. at 1604:1-25. After Juror Burden was dismissed, the jury produced a second verdict within minutes. Id. at 1619:1-20. The record strongly suggests that the jury was determined to assign damages to Christiansen, and succeeded in doing so once Juror Burden, the holdout juror, was removed. The apparent lack of actual deliberation here reflects the jury's failure to act an impartial fact finder.

The jury's quick production of a second verdict after the dissident juror's removal indicates that the jury improperly used the verdict as a means to an end. Like the *Riley* jury, which altered its initial findings and quickly assigned liability to defendant, the jury here reached a verdict assigning liability and $10 million in punitive damages minutes after a holdout juror was removed. (Nov. 24 Afternoon, 1583:1-4, 1617:1-24; Nov. 24 Evening, 1619:1-1-23). Unlike the *Duk* jury, which

produced consistent findings with the exception of liability, the jury's verdicts here were only consistent with respect to its apparent intent to assign damages to Christiansen. This Court must order a new trial because the record strongly suggests that the jury improperly used the verdict as a means to an end.

B. The district court coerced the jury by abruptly halting the original verdict's production after the jury's answer to Question 1A was announced, signaling to the jury that its answer was wrong.

A court's post-verdict jury instruction entails a considerable risk of biasing the jury. While a right to a fair trial requires that a jury is fully informed, it generally does not justify a jury's reconsideration of its verdict. *Perricone v. Kansas City S. Ry. Co*., 704 F.2d 1379 (5th Cir. 1983). Even when jury instructions are framed neutrally and the judge lacks intent to bias the jury, post-verdict jury instructions nonetheless pose a signficant risk of coercion. For instance, in *Perricone v. Kansas City S. Ry. Co*., the Fifth Circuit indicated that the trial court abused its discretion by instructing the jury on negligence law after it returned a conflicting verdict. *Id.* at 1378. Although the trial court phrased its instructions in a neutral manner, there remained a "substantial risk that such supplemental instruction given immediately to the jury on its return is coercive." *Id.* The court warned that a judge's instructions can communicate an attitude in a myriad of indirect ways, such as a cocked eyebrow or a sideway glance, that are off record

and unreviewable. *Id.* As post-verdict jury instructions entail a signficant risk of biasing the jury, there is a strong presumption that such instructions are coercive.

Persuasive precedent has only permitted post-verdict jury instruction where the court explicitly warned the jury that the instruction should not be construed to mean that a certain result is proper. For example, the Fifth Circuit held that a district court judge did not abuse his discretion by resubmitting a verdict form where the judge explained to the jury that the act of resubmission should in no way be construed to suggest that a certain decision should be reached. *Nance v. Gulf Oil Corp.*, 817 F.2d 1176, 1179 (5th Cir. 1987). Where the judge fails to explain that its post-verdict instruction should not be construed as expressing favoritism, a new trial should be ordered to corect for the coercive effect of that instruction.

Here, the district court abused its discretion by halting production of the jury verdict immediately after the jury's answer to Question 1A was announced, signalling to the jury that its finding of no liability was a mistake. The post-verdict instruction as well as the timing of the instructions were coercive. Like in *Perricone*, where the Fifth Circuit held that neutrally-phrased instructions were coercive, this Court should find that the judge's post-verdict instructions here presumptively biased the jury. (Nov. 20 Afternoon, at 1519:5-20). Furthermore, the district court's post-verdict instructions here entailed a greater risk of jury coercion than those in *Perricone* because the instructions' timing was highly suggestive. *Id.*

The district court's termination of the verdict's production after the jury's answer to Question 1A was announced reasonably suggested to the jury that its finding of no liability was wrong. *Id*. The district court's termination of the verdict's announcment after Question 1A was read aloud and post-verdict instruction are both presumptively coercive.

As the district court failed to properly qualify its instructions, Wright Medical's right to a fair trial can only be ensured if this Court grants a new trial. A judge's instructions should not compel a jury to reconsider its findings. However, because the district court here failed to explain to the jury that its instructions should not be construed as favoring a certain result, the jury was primed to change its answer to Question 1A, the dispositive legal issue. (Nov. 20 Afternoon, at 1519:5-22). In contrast to *Nance*, where the Fifth Circuit expressly warned the jury that its instructions should not be construed as favoritism after the verdict was produced in full, the district court here failed to properly qualify its instructions even though it stopped the verdict's production in a manner signalling that the jury's answer to Question 1A was wrong. *Id*. This Court must order a new trial because the district court's post-verdict instructions, sans qualifying language, reasonably communicated to the jury that its finding of no liability was improper.

[Conclusion omitted]

Applicant Details

First Name	**James**
Last Name	**Zapp**
Citizenship Status	**U. S. Citizen**
Email Address	**zapp@usc.edu**
Address	**Address** **Street** **2255 W Broadway Apt G308** **City** **Anaheim** **State/Territory** **California** **Zip** **92804** **Country** **United States**
Contact Phone Number	**6033212102**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2015**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 10, 2019**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**The Southern California Review of Law and Social Justice**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Libby, Jonathan
jonathan_libby@fd.org
(213) 894-2905
Levenson, Brad
Brad_Levenson@fd.org
Rummel, Heidi
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References

Johnathan Libby
Professor, Deputy Federal Public Defender â€“ Central District of California
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Heidi Rummel
Professor, Clinical Director â€“ Post-Conviction Justice Project
Phone: (818) 720-2620
Email: hrummel@law.usc.edu

Brad Levenson
Deputy Federal Public Defender â€“ District of Nevada
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Email: brad_levenson@fd.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

September 15, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes,

I am an attorney who is currently employed as a Deputy Public Defender by the Orange County Public Defender's Office. I graduated in May 2019 from the University of Southern California, Gould School of Law where I was an editor for the Review of Law and Social Justice. I am writing to apply for a 2021–2023 term clerkship in your chambers.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample is a mock appellate brief written based on a fictional record. I would be more than happy to provide any additional information needed. Also enclosed are letters of recommendation from Professor Heidi Rummel (818.720.2620), Professor Jonathan Libby (213.894.2905), and Deputy Federal Public Defender Brad Levenson (702.388.5167).

If there is any other information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,
James Zapp

James Zapp

2255 W Broadway Anaheim, CA 92804 ▪ 603.321.2102 ▪ Zapp@usc.edu

EDUCATION

University of Southern California Gould School of Law, Los Angeles, CA
Juris Doctorate, May 2019
Honors: Copy Editor, Review of Law and Social Justice

Boston University, Boston, MA
Paralegal Certificate, February 2016

American University, Washington, DC
Bachelor of Arts, Double Major in Political Science and Law and Society, May 2015

LICENSE

State Bar of California (Admitted 2019)

EXPERIENCE

Orange County Public Defender, Santa Ana, CA January 2020 – July 2020
Deputy Public Defender
Provide complete representation to clients at all stages of litigation including arraignment, pre-trial motions, trial, and post-conviction. Manage a calendar of over one hundred misdemeanor cases through effective organization and planning. Embrace a client focused approach to public defense work centered on providing legal support that is most helpful for the individual client, whether that be writing and arguing motions on their behalf or finding a program which suits their needs.

Orange County Public Defender, Santa Ana, CA August 2019 – December 2019
Post-Bar Law Clerk
Researched, wrote, and edited numerous motions for ongoing impact litigation in Orange County related to the improper booking of evidence, the recording of privileged attorney-client phone calls, the unconstitutional usage of "jail house" informants, and a number of other issues. Provided objective analysis of various legal arguments related to discovery, criminal procedure, and other areas of law.

Post-Conviction Justice Project, Los Angeles, CA August 2017 – May 2019
Certified Law Student/Supervisor
Wrote and filed a Habeas Petition on behalf of a client who had been denied parole in a manner which violated due process. Prepared numerous incarcerated clients for parole hearings through in-person meetings. Personally represented three clients in front of the California Board of Parole Hearings.

Riverside Public Defender, Riverside, CA May 2018 – August 2018
Certified Law Clerk, Misdemeanor Unit
Represented clients in an arraignment court by negotiating on their behalf, entering pleas with the court, and providing any other related assistance the client might need.

Federal Public Defender Capital Habeas Unit, Las Vegas, NV May 2017 – August 2017
Law Clerk
Researched and analyzed various legal issues related to the appeals of capital clients. Formulated and drafted various legal arguments for inclusion in clients' habeas petitions.

INTERESTS

Violin ▪ Skiing ▪ Football, Basketball, and Baseball Fan ▪ Hiking and Camping ▪ Fencing ▪ Volleyball

James Zapp
University of Southern California Law School
Cumulative GPA: 3.43

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law: Structure	Brown	3.1	3.0	
Contracts	Gross	3.1	4.0	
Law, Language, and Values	Garet	2.9	2.0	
Legal Research, Writing, and Advocacy I	Libby	3.0	3.0	
Procedure I	Rich	2.9	4.0	

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Constitutional Law: Rights	Brown	3.0	3.0	
Criminal Law	Armour	3.1	3.0	
Legal Research, Writing, and Advocacy II	Libby	3.2	2.0	
Property	Altman	3.2	4.0	
Torts I	Bice	3.2	4.0	

Fall 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Business Organizations	Scotten	3.7	4.0	
Evidence	Bacon	3.4	4.0	
Federal Criminal Law	Klein	3.4	2.0	
Post-Conviction Justice Seminar I	Brennan	3.9	5.0	
Review of Law and Social Justice Staff	Cruz	CR	1.0	
Review of Law and Social Justice Writing	Rummel	CR	1.0	

Spring 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Gifts, Wills, and Trusts	Murphy	3.5	4.0	
Legal Profession	Danner	3.6	3.0	
Post-Conviction Justice Seminar II	Rummel	3.7	5.0	
Review or Law and Social Justice Staff	Cruz	CR	1.0	

Fall 2018

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Clinical Training	Rummel	4.0	4.0	
Advanced Legal Writing and Advocacy: Appellate Advocacy	Libby	4.1	4.0	
Criminal Procedure	Griffith	3.1	4.0	
Revliew of Law and Social Justice Editing	Cruz	IP	3.0	

Spring 2019

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Advanced Clinical Training	Rummel	3.9	4.0	
Community Property	Kiley	CR	2.0	
Cyberlaw: Legal Issues Impacting Providers and Users of Inte	Tepstein	3.9	2.0	
Local Government Law	Jenkins	3.5	3.0	
Review of Law and Social Justice Editing	Cruz	CR	3.0	

Grading System Description

The USC grading system uses both numbers and letters, ranging from 1.9 to 4.4 with letter-grade equivalents ranging from F to A+. The combination affords faculty more grading nuances while still presenting grades that are easily understandable. For example, although both 3.3 and 3.4 are grades of B+, the 3.4 carries a slightly higher numerical value and therefore contributes to a higher GPA. "CR" is assigned as the satisfactory passing grade in courses that are not graded numerically, or when a student has elected to take a numerically graded course on a CR/D/F basis. The USC grading scale includes the following number grades and letter-grade equivalents.

USC Numerical Grade USC Letter Grade Equivalent
4.4 – 4.1 A+
4.0 – 3.8 A
3.7 – 3.5 A-
3.4 – 3.3 B+
3.2 – 3.0 B
2.9 – 2.7 B-
2.6 – 2.5 C+
2.4 C
2.3 – 2.1 C-
2.0 D
1.9 F

Honors Designation

Highest Honors: 4.4 (A+)
High Honors: 4.3 (A+) – 3.9 (A)
Honors: 3.8 (A) – 3.4 (B+)
None: 3.3 (B+) – 1.9 (F)

James Zapp
American University
Cumulative GPA: 3.64

Fall 2011

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Cross-Cultural Communications		3.7	3	
Mentored Field Practicum		4.0	3	
Political Power and American Public Policy		3.7	3	
Politics In the U.S.		3.7	3	
Understanding Music		4.0	3	

Spring 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
College Writing, Intensive		3.7	3	
Comparative Politics		3.3	3	
Metropolitan Politics		3.3	3	
Power, Privilege, and Inequality		2.7	3	
World Politics		3.7	3	

Fall 2012

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
American Encounters: 1492-1865		3.33	3	
American Political Parties		2.67	3	
Basic Statistics		4.00	4	
Environmental Politics & Ethics		3.33	3	
The Human Genome		3.33	3	

Spring 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Dynamics of Political Change		3.33	3	
Justice, Law, & The Constitution		3.00	3	
Politics of Population		3.33	3	
The Molecular World		4.00	4	
Western Legal Tradition		4.00	3	

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Political Research		3.67	3	

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Canadian Politics		4.00	3	
Comparative Systems of Law & Justice		4.00	3	
Deprivation of Liberty		4.00	3	
Individual Freedom vs Authority		3.33	3	
Issues in Search & Seizure		4.00	3	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Interest Group Politics		3.33	3	
Justice and Public Policy		3.33	3	
National Security Debates		4.00	3	
Philosophical Problems in Law		4.00	3	

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Current Issues: National Security		4.00	3	
Labor, Law, & U.S. Capitalism		3.67	3	
Law and Social Theory		3.67	3	
The Legal Profession		4.00	3	

Grading System Description

Grading System Effective Fall 2012
Grade Quality Points (QP) In GPA
A Excellent 4.00 Yes
A- 3.67 Yes
B+ 3.33 Yes
B Good 3.00 Yes
B- 2.67 Yes
C+ 2.33 Yes
C Satisfactory 2.00 Yes
C- 1.67 Yes
D Poor 1.00 Yes
F Academic Fail 0.00 Yes
FX Administrative Fail in Course for Grade 0.00 Yes

Grading System Effective Fall 1978 to Summer 2012
Grade Quality Points (QP) In GPA
A Excellent 4.0 Yes
A- 3.7 Yes
B+ 3.3 Yes

B Good 3.0 Yes
B- 2.7 Yes
C+ 2.3 Yes
C Satisfactory 2.0 Yes
C- 1.7 Yes
D Poor 1.0 Yes
F Academic Fail 0.00 Yes
FX Administrative Fail in Course for Grade 0.00 Yes

FEDERAL PUBLIC DEFENDER
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September 24, 2020

The Honorable Elizabeth W. Hanes
United States District Court
Eastern District of Virginia

Re: **Recommendation for James Zapp**

Dear Judge Hanes:

I write in my capacity as a Lecturer in Law at the University of Southern California Gould School of Law to highly recommend James Zapp for a Law Clerk position in your Chambers.

James was a student of mine in both his first and third years of law school: first, as a student for both semesters of my first-year Legal Research, Writing and Advocacy class, and later, during his third year, as a student in an upper division course I teach in advanced appellate advocacy. I thus had the opportunity to witness James's transformation into an outstanding student, excellent researcher and writer, and effective advocate. Although, like many first-year law students, he experienced a learning curve transitioning to law school, resulting in a somewhat average performance in his first-year legal writing class, his persistence and hard work throughout law school ultimately resulted in his receiving an A+ — one of the highest grades I've given — in my advanced appellate advocacy class during his third year.

My advanced appellate advocacy class serves as a simulated clinic in which students are required to review a record of a federal criminal case, identify potential appellate issues and research and write an appellate brief. The students also argue that appeal and argue a second appeal (representing the opposite side) of a case scheduled to be argued before the Ninth Circuit the following month. James excelled in all areas of the class. His work ethic, along with the skills he has developed in legal research, writing, and oral advocacy, leave no doubt in my mind that he will make an excellent law clerk and an outstanding attorney.

Due to the nature of my course, I have extensive interactions with my students and thus I also have had the opportunity to get to know James on a personal level. I find James to be a genuinely good person with a wide variety of interests, and a great deal of intellectual curiosity. Indeed, he took every opportunity to meet with me regularly to discuss his performance and see how he could improve.

As a deputy federal public defender who has briefed hundreds of appeals and argued more than 100 cases in the federal appeals courts, I know how important the role of a law clerk is to a judge's work. And as someone who has served on the hiring committee for the Federal Public Defender Office in Los Angeles, I have had the opportunity to review and interview applicants from every top law school in the country, including those who have served as law clerks at the Supreme Court and most of the federal courts of appeals. Based on everything I know of James's work, he has demonstrated every capacity to be among those top-rate attorneys.

I believe James Zapp would be a tremendous asset to you if given the opportunity to serve as one of your law clerks. I highly recommend him.

Should you have any questions, please do not hesitate to contact me.

Respectfully yours,

/s/ *Jonathan D. Libby*

JONATHAN D. LIBBY
Deputy Federal Public Defender and
Lecturer in Law, USC Gould School of Law

September 15, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am writing to offer my highest recommendation for James Zapp for a position as a Federal Law Clerk. James is one of the most motivated and diligent law clerks that I have had the pleasure of supervising. James assisted a number of attorneys and myself in the Federal Public Defender's office with the representation of clients in capital habeas cases. In all my interactions with him and in all the work he did, James exemplified the highest level of diligence and maturity. I am confident that he would be an invaluable addition as a law clerk.

I have spoken with James on a number of occasions about the possibility of pursuing a federal clerkship. I believe it is an opportunity to which he is well suited. He has expressed great excitement about the prospect of serving as a law clerk as a way to acquire the invaluable knowledge and experience it can provide.

James exhibited strong organizational work habits, so he had no difficulty fulfilling large amounts of work at a rapid pace. With this work ethic, he was always willing to take on complex or otherwise difficult legal assignments. When possible, James even sought out these opportunities with a focused and upbeat attitude. As such, he is pleasant to work with, in addition to being reliable.

Legal research and writing skills are essential to the work done by our office. As a law student, James demonstrated highly advanced research and writing skills. These abilities enabled him to directly contribute to major motions being drafted by our attorneys. I am certain that throughout the remainder of his time in law school and beyond he has continued to advance in his written work.

Since working with me, James has sought out practical experiences to refine his skills. With the real-world knowledge he has acquired, combined with his already impressive writing abilities and his determination to produce the best work possible, James will be highly effective as a clerk. His drive to learn and improve will result in James excelling in whatever is needed of him.

I give my strongest recommendation of James Zapp. I truly believe he will make an excellent law clerk and be a terrific asset. Please feel free to contact me with any questions.

Sincerely,

Brad D. Levenson
Assistant Federal Public Defender

Heidi L. Rummel
Clinical Professor of Law and Director, Post-Conviction Justice Project
Gould School of Law
University of Southern California
Los Angeles, California 90089-0071
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Fax: 213 821-5746
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September 15, 2020

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I wholeheartedly recommend James Zapp for a position as a law clerk in your chambers. As Co-Director of the Post-Conviction Justice Project (PCJP) at the University of Southern California Gould School of Law, I supervised James for nearly two years as a certified law student providing direct representation to clients serving life terms at parole hearings and on habeas corpus petitions.

James is a talented writer – capable of distilling extensive material, both factual and legal, into concise and persuasive written form. His research and writing skills, along with strong oral advocacy, made him a very effective advocate for his clients. In one particularly challenging case where historical factors had prevented a client's release for many years, James' advocacy on habeas corpus and before the Board of Parole Hearings resulted in the client's release on parole.

He is also a highly creative critical thinker and can adapt quickly to unique cases. In addition to his heavy case load, James took the initiative to volunteer for an expansive project where professors and students conducted workshops throughout the California prison system to educate and counsel former juvenile life without parole inmates about a new law creating parole eligibility. Traveling across the state, James conducted limited scope representation meetings with dozens of inmates at various institutions with minimal supervision.

James' can-do attitude really sets him apart from most law students I supervise. Hardworking and motivated, he embraces any opportunity to take on challenges and go above and beyond. Whatever the work, he approaches it with confidence, initiative and a consistently positive demeanor. He requires minimal supervision and direction, but is always receptive to feedback and guidance.

James has discussed with me his desire to work as a judicial clerk. He clearly understands the invaluable experience he will gain in a clerkship. His excellent research and writing skills combined with his intelligence, work ethic and maturity will make him an invaluable asset in your chambers.

If I can provide you with any further information about James or be of any additional assistance, please do not hesitate to contact me.

Sincerely,

Heidi L. Rummel
Clinical Professor and Director
Post-Conviction Justice Project

James Zapp
2255 W. Broadway
Anaheim, CA 92804

Writing Sample - Objective

This writing sample consists of the introduction and the central section of a longer note written for the Review of Law and Social Justice. It was not selected for publishing. I would be more than happy to provide any additional context or the note in its entirety as needed.

The Unrealized Importance of Hurst v. Florida: The Supreme Court's Continued Rejection of the Judge as the Finder of Fact

1. Introduction

Over the past two decades the Supreme Court has steadily taken further steps reducing what the Court views to be judicial fact-finding. *Hurst v. Florida* is the latest in the line of cases which perform this role. Despite this, *Hurst* has received relatively little attention in academic spheres. This is mainly due to the fact that, on its surface, *Hurst* can be quickly summarized as a clarification of prior, more significant cases. Even so, *Hurst* contains language throughout its majority opinion that has the potential for far greater impact than it has been given credit for. The Court's express rejection of judicial fact-finding as the central deciding factor for the *Hurst* case, as well as the removal of the restricting language on this rejection that was present in previous rulings, represents a significant shift in the wider applicability of this case's ruling as compared to past opinions of the same case line.

Judicial fact-finding plays a number of very diverse roles within the judicial system. The Supreme Court's view of judicial fact-finding has the potential to have large ripple effects to these various areas should the views expressed in *Hurst* be applied more widely. Though it is unlikely that a significant and sudden shift will occur in the near future, the previous rulings of

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the Court show a continual and steady effort to reduce the presence of judicial fact-finding in a variety of applications. It is important to explore *Hurst* not only as an avenue for sudden change but as a window into how the Court might proceed forward should they continue with this trend of reducing the usage of judges as finders of fact. The expansive language in *Hurst* may very well serve as the basis for subsequent and continually more expansive rulings.

2. The *Apprendi*-Based Case Law and Trends

[*This section was removed in order to reduce the length of this writing sample. It mainly consisted of a summary of the* Apprendi v. New Jersey *and the cases that succeeded it. As previously stated, I would be more than happy to provide this section if it is needed.*]

3. The Hurst Decision

a. The Background

Hurst v. Florida is a Supreme Court case that represents the latest case stemming from *Apprendi v. New Jersey*. Stemming directly from the Supreme Court's decision in *Ring v. Arizona*, *Hurst* again addresses the issue of judicial fact-finding and determination in capital cases. Particularly, *Hurst* approaches the sentencing structure used by Florida in cases where defendants face the death penalty.[1] Even before *Ring* was decided, Florida had utilized a

[1] *Hurst v. Florida*, 136 S.Ct. 616, 619 (2016).

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structure for sentencing those found guilty of capital crimes that was relatively unique.[2] As noted by the majority in *Ring*, at the time that decision was published twenty-nine states of the thirty-six with capital punishment committed sentencing decisions in capital cases to the jury.[3] The decision of *Ring* addressed the five states that had systems which left the final sentencing decision entirely to the trial judge. Florida, however, used what the Court called a "hybrid scheme" which was not directly addressed in *Ring*.[4] In a hybrid scheme juries in capital cases that found a defendant guilty would then render an additional advisory decision as to whether the death penalty was recommended.[5] Then the trial judge would make the ultimate decision as to whether to sentence the defendant to death.[6] Interestingly, the dissent penned by Justice O'Conner in *Ring* had made reference to the Florida sentencing scheme along with three other states, Alabama, Delaware, and Indiana, that the majority had recognized as having a hybrid sentencing system.[7] Justice O'Conner identified that the decision of *Ring* represented a continually opening door to issues of judicial fact-finding. She also noted that the majority opinion's language and legal position left the hybrid sentencing structure clearly next on the chopping block for whenever a relevant case with standing reached the Supreme Court.[8]

The petitioner in *Hurst v. Florida* was Timothy Lee Hurst.[9] Mr. Hurst had been charged with the murder of a women named Cynthia Harrison who was Mr. Hurst's co-worker at the restaurant where he was employed.[10] Ms. Harrison had been found bound and gagged in the

[2] *Ring v. Arizona*, 536 U.S. at 621.
[3] *Id.* at Footnote 6.
[4] *Id.*
[5] *Hurst v. Florida*, 136 S.Ct. at 620.
[6] *Id.*
[7] *Ring v. Arizona*, 536 U.S. at 621 (J. O'Conner dissent).
[8] *Ring v. Arizona*, 536 U.S. at Footnote 6.
[9] *Hurst v. Florida*, 136 S.Ct. at 619.
[10] *Id.*

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restaurant's freezer with over 60 stab wounds.[11] Mr. Hurst was charged with Ms. Harrison's murder on the basis that he was the only other person scheduled to work at that time, that he had been heard stating he planned to rob the restaurant, and that he had disposed of evidence using the stolen money.[12] Mr. Hurst's defense, that he had not even been present at the restaurant as his car had broken down, failed to convince the jury and he was convicted of first degree murder.[13] The judge had instructed the jury that they could find Mr. Hurst guilty of first degree murder on one of two theories; either Mr. Hurst had committed a premeditated murder or he had committed felony murder as a result of an unlawful killing during a robbery.[14] The jury did not specify in their decision which of these two theories they had used when convicting Mr. Hurst of first degree murder.[15]

The hybrid structure of Florida's sentencing proceedings meant that after he was convicted of first degree murder Mr. Hurst was at maximum eligible for life imprisonment.[16] An additional sentencing proceeding would take place in order to determine if he should be punished by the death penalty.[17] To impose the death penalty, the trial judge was required to hold an evidentiary hearing in the presence of the jury, after which the jury was to render an advisory sentence of either life or death with support for its reasoning.[18] Then the judge weighed what he/she determined to be the aggravating and mitigating factors based on what had been presented in the evidentiary hearing and determined whether a punishment of a life sentence or death was

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* at 619-620.
[16] *Id.* at 620.
[17] *Id.*
[18] *Id.*

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appropriate.[19] After the evidentiary hearing conducted by the judge in Mr. Hurst's case, the jury advised that Mr. Hurst be given the death penalty.[20]

Mr. Hurst was eventually resentenced at the behest of the Florida Supreme Court.[21] At the second hearing the jury again voted in favor of the death penalty on the grounds that they found an aggravation beyond a reasonable doubt.[22] The trial judge then sentenced Mr. Hurst to death based, in part, on her own findings, on which she placed "great weight".[23] This case eventually reached the Supreme Court of the United States after the trial court's decision was affirmed by the higher Florida courts.[24] Certiorari was granted on March 9, 2015 on the question of whether the death penalty sentencing scheme of Florida violated the Sixth or Eight Amendments based on the decision of the Court in *Ring v. Arizona*.[25] Oral Argument occurred in October 2015 and the court's opinion was released on January 21 2016.[26]

b. The Majority Opinion

The majority opinion written by Justice Sotomayor in *Hurst v. Florida* is exceptionally short for a modern Supreme Court case. This reflects the basic view of *Hurst* as a continuation of *Ring v. Arizona*. *Hurst* is, at its core, a case in which the Court provides additional clarification

[19] *Id.*
[20] *Id.*
[21] This resentencing was not directly related to the issues eventually considered by the Supreme Court of the United States. The Florida Supreme Court found that at Mr. Hurst's original sentencing, Mr. Hurst's attorney had failed to present "significant mental mitigation" due to the fact that counsel had decided to skip a mental evaluation for Hurst. *Hurst v. Florida*, 136 S.Ct. at 620.
[22] *Id.*
[23] *Id.*
[24] *Id.* at 620-621.
[25] Id. at 621.
[26] *See generally Hurst v. Florida*, 136 S.Ct. 616.

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about its ruling in *Ring*. As noted earlier, Justice O'Conner's dissent of *Ring* recognized that the hybrid statutes used by Florida and three other states fall squarely within a blind spot in *Ring*'s majority's opinion.[27] The *Hurst* case steps in to address the edge cases left untouched the ruling in *Ring*.

However, this view of *Hurst* ignores much of the larger context of the cases on which it builds. It is equally valid to see *Hurst* as the latest, and perhaps the most impactful, decision in the Court's movement to end judicial fact-finding which started by *Apprendi v. New Jersey*. The cases mentioned earlier, *Ring v. Arizona*, *Southern Union Co. v. United States*, and *Alleyne v. United States*, present a pattern. Throughout these cases, there is a progression in the continued erosion of the discretion afforded to judges to perform fact-finding. Where the Justices' individual opinions on this issue land are obviously unknown, but the *Hurst* majority opinion provides some additional weight to the idea that the trend presented by its predecessor cases is significant.

Centrally, the majority in *Hurst* considers the issue of whether a system which does not allow the jury to vote to impose the death penalty is valid under the Sixth Amendment.[28] To reach a decision on this issue the Court reviews the relevant rights afforded by the Sixth Amendment.[29] It summarizes *Apprendi* as holding, "that any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must

[27] Calling this a "blind spot" may be entirely unfair to the majority in *Ring* as it was arguably an issue of scope that prevented the Ring opinion from stretching to these hybrid statutes. Though Justice O'Conner points this out as a hole formed by the majority's rule, if Justice Ginsburg had filled this hole, *Ring* could very reasonably have been a decision where the Court overstepped the bounds of the issue in front of it. Thus, it is entirely possible—if not certain—that the *Ring* case left this issue for a later date entirely on purpose so as to have an appropriate case in front of it to address the issue. *Ring v. Arizona*, 536 U.S. at 621 (dissent).
[28] *Id.* at 619.
[29] *Id.* at 621.

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be submitted to a jury," and then tracks the cases reviewed under *Apprendi* since it was decided.[30] Understandably, given the nature of the facts in *Hurst*, Justice Sotomayor spends a large portion of this time explaining the position of the majority in *Ring*.[31] In the process she states that Arizona's scheme was invalidated in *Ring* "because the State allowed a judge to find the facts necessary to sentence a defendant to death."[32] This is a liberal reading of the *Ring* decision, though it is still consistent with the language used in that case. Justice Sotomayor chooses to further reinforce this position when she specifies that the Florida and Arizona statutes are similar (and thus the *Ring* holding applies to both) simply because "Florida requires judges to find facts."[33] This surprisingly strong commitment of the Court's opinion specifically to the issue of judicial fact-finding—as opposed to situating the decision solely as a minor extension of *Ring*—in addition to the majority's interpretation of previous case law as a strong rejection of judicial fact-finding, is further repeated throughout the *Hurst* decision.

The majority opinion then turns to a discussion of the various arguments brought by the state of Florida in opposition.[34] These cover a variety of positions including: that the advisory decision brought by the jury should be sufficient to satisfy *Ring*, that previous cases decided in front of the Supreme Court accepting the Florida statute preclude a decision declaring it unconstitutional, and that the error was harmless.[35] The majority rejects each of these arguments in turn.[36] Additionally, the Court rejects the state's assertion that Mr. Hurst's prior admissions

[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.* at 622.
[34] *Id.* at 622-624.
[35] *Id.*
[36] *Id.*

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satisfies the requirements of the *Ring* decision.[37] The Court does so on the grounds that the state's argument necessitates that the defendant has waived his right to a jury trial; implicitly stating that the accused's Sixth Amendment right to have *all* facts found before a jury beyond a reasonable doubt applies to admitted facts barring waiver.[38]

The conclusion of the majority opinion is quite brief but says a significant amount in just a few words. It reads:

> The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, is therefore unconstitutional.
>
> The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.
>
> So ordered.[39]

Justice Sotomayor's use of simplicity in this conclusion lends even greater weight to the language used within it. In an already short opinion, the choice to keep the summary of the court's view stated so concise conveys a sense that this is exactly how simply the court views this issue. This becomes especially important given the fact that this summary asserts the entire basis for the Court's decision to invalidate Mr. Hurst's current sentence, is that such a sentence must be based "on a jury's verdict, not a judge's factfinding."[40] Though this does fully reflect the views that appear earlier in the Court's opinion, having them reframed with such certainty in the majority's conclusion is certainly surprising.

[37] *Id.* at 622-623.
[38] *Id.*
[39] *Id.* at 624.
[40] *Id.*

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c. Concurrences and Dissents

Much like the majority opinion, the concurrences and dissents in *Hurst v. Florida* are very brief. Justice Breyer provides a concurrence that is a single short paragraph in length. The dissent written by Justice Alito, while nowhere near the brevity of Justice Breyer's concurrence, is still quite short.[41]

Justice Breyer's concurrence is fairly easily summed up: he feels the court reached the right result based on the wrong Constitutional Amendment.[42] His view is that the Eighth Amendment protection against cruel and unusual punishment is what requires the jury, not the judge, to make sentences of death.[43] He had previously expressed in *Ring* a similar view—that *Ring* was properly decided but the jury sentencing requirement in capital cases stemmed from the Eighth Amendment, not from the Sixth Amendment.[44] His concurrence is effectively a long citation to this previous concurrence.

Justice Alito's dissent takes issue with essentially every part of the *Hurst* ruling—from the majority's belief that the Sixth Amendment provides the right to have all facts determined by a jury, to the majority's rejection of harmless error.[45] Despite these issues, Justice Alito does not take time delving too deeply into many of these complaints, presumably because he feels his history of dissent in the progeny of *Apprendi* is well documented.[46] He does take a bit longer defending the system used by Florida, and in claiming that harmless error applies.[47] However, on

[41] *Id.* at 624-627.
[42] *Id.* at 624 (J. Breyer dissent)
[43] *Id.*
[44] *Id.*
[45] *Id.* at 624-627.
[46] *Id.*
[47] *Id.*

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the whole, Justice Alito's dissent reads like an extended list of his agreement with all potential arguments against the majority's opinion.[48]

What is somewhat notable about the dissents and concurrences in *Hurst* from other *Apprendi* cases is that they are very limited in number. Where prior cases, including *Ring*, were decided by a narrower margin, *Hurst v. Florida* was an 8-1 decision.[49] This could be due to the change in the Court's Justices; the two dissenting justices in *Ring v. Arizona*, Justice Rehnquist and Justice O'Connor, both had left the Court by this time.[50] The *Apprendi* cases all show an immense amount of disagreement, even from present judges. What exactly this might say about the Court's larger opinion is difficult to say but it seems, given the prolific and loquacious reputation of several of the justices in the majority of *Hurst*, that it is safe to say that their silence at least can be read as a strong endorsement of the language and conclusions drawn by Justice Sotomayor. It would have been very easy for the other justices to pen a concurrence or even a dissent if they took issue with the specifics of the majority's opinion without risking the clarity of outcome of this case. Their choice to not follow this route but instead remain silent can quite possibly be read as a surprising unity between the seven judges of the majority in support of the language of the majority opinion.

[48] *Id.*
[49] Though with the complete difference of opinion by Justice Breyer in the basis for this ruling it would almost be more accurate to say it was a 7-1-1 ruling. *See generally Hurst v. Florida*, 136 S.Ct. 616.
[50] *See generally Ring v. Arizona*, 536 U.S. 584.

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d. Understanding *Hurst*

Compared to cases like *Apprendi* and *Ring*, *Hurst* has received much less academic attention. Reducing *Hurst* to an extension of prior cases is a temptation that is understandable. It is presented as an extension of *Ring* and fits expectations for that by addressing a minor factual alteration of *Ring* in a short opinion. The Florida statute is even referenced within the dissent of *Ring* as further evidence to support this view.[51] That said, simply dismissing *Hurst* as an application and clarification of *Ring* risks overlooking some of the very significant aspects of this decision.

Without even discussing the semantics of *Hurst*, the factual differences between it and *Ring* should not be so easily dismissed. Florida's law still required an advisory decision; one that the judge was bound to consider. The jury in Mr. Hurst's case had given an advisory decision finding that he should be eligible for the death penalty. This finding was informed by an evidentiary hearing performed in their presence. The argument that there was harmless error is mostly based on the fact that the jury voted to impose the death penalty regardless. In fact, the majority fails to even present evidence in their opinion that there have been any incidents where the trial judge imposed the death penalty without a complimentary advisory opinion by the jury. Despite all this, the Court still determined that Mr. Hurst's Sixth Amendment rights were violated by the structure of Florida's capital sentencing statute. This signifies that the Court appears to have felt strongly about the importance of the position they were taking; that, regardless of real impact, this Sixth Amendment right must be protected vigorously.

[51] *Ring v. Arizona*, 536 U.S. at 621 (J. O'Conner dissent).

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Indeed, language in defense of this Sixth Amendment right in *Hurst* is quite broad, even if its effect is not. The primary holding of *Hurst* seemingly only affects a very narrow set of situations: the capital sentencing statutes of the four states with hybrid structured statutes.[52] But the language and stance that Justice Sotomayor takes in writing this opinion have far more reach than its primary holding. Primarily, the unequivocal commitment of all factual findings to the jury is of immense significance. Unlike rulings such as *Apprendi*, which restricted this language with additional conditions—such as *Apprendi*'s application of this protection only to facts that increased the sentence beyond the prescribed maximum—*Hurst*'s language is near universal in applicability. *Hurst* does not bind the limit on judicial fact-finding to statutory maximums or other limiting factors. Instead, the Court moves to using language about increases to "authorized" sentences but also ignores even this caveat in its conclusion. Instead Justice Sotomayor states the majority's decision was solely based on the fact that the sentence was predicated on "a judge's factfinding" and not on a jury's verdict.[53]

The Court's future intentions are certainly not clear after its decision in *Hurst*. The *Hurst* decision seems focused on the specific facts of that case, but at the same time the language used by the majority adds additional intrigue to an otherwise routine clarification of *Ring*. The potential interpretations and the applications of even the most conservative of those are quite

[52] The actual impact of this is even smaller than is apparent at first glance. The four states identified by Justice O'Connor in her *Ring* dissent: Florida, Delaware, Indiana, and Alabama, as having hybrid statutes account for a fairly small portion of total death penalty executions in the United States. As of February 1, 2018 these four states account for 192 of death penalty executions since capital punishment was reinstated in 1976. The total executions occurring in this in this time period nationally totals 1468. This means that the four states directly affected by the *Hurst*'s primary holding account for only 12% of the total executions in the United States. Indiana has executed only one person in the ten years prior to writing this and Delaware's Supreme Court has since struck down capital punishment in their state. Thus, a primary ruling already limited in effect is even more tightly focused in scope than it might appear on its face.
[53] *Hurst v. Florida*, 136 S.Ct. at 624.

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expansive. *Hurst* opens wide a door to new Sixth Amendment applications that the Court had already kept ajar for some time.

4. The Possible Impacts of Hurst

[*This section was removed in order to reduce the length of this writing sample. It discussed the ways in which the broader language of* Hurst v. Florida *could apply to a wide variety of situations. It also addressed what the next steps of the Court might realistically be. As previously stated, I would be more than happy to provide this section if it is needed.*]

Applicant Details

First Name	**Alec**
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Applicant Education

BA/BS From	**Wayne State University**
Date of BA/BS	**May 2018**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Journal of Law & Society** **Michigan Journal of Gender & Law**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Henry M. Campbell Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 14, 2021

The Honorable Elizabeth W. Hanes
US District Court for the Eastern District of Virginia
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am a rising third-year student at the University of Michigan Law School and I am writing to apply for a clerkship in your chambers for the 2022-2024 term. The opportunity to start developing my legal career in a new part of the country is very exciting, and in Richmond even more so.

Prior to law school, I worked for the US Attorney's Office for the Eastern District of Michigan. There I learned the attention to detail needed for court filings and how to manage conflicting deadlines and a busy docket. This experience served me well while I worked for the University of Michigan's Office of General Counsel (OGC) during my 1L summer and 2L year. OGC required me to develop adept legal research abilities and the skills to quickly pivot from working in one niche area of law to another. These two experiences have convinced me that I would enjoy a career as a litigator and that I can be an asset to a busy office with a diverse docket of work.

I have attached my resume, law school transcript, and a writing sample for your review. Letters of recommendation from the following individuals are also attached:

Professor Margo Schlanger, mschlan@umich.edu, 734-615-2618
Professor Mark Osbeck, mosbeck@umich.edu, 734-764-9337
Mr. David Grimm, degrimm@umich.edu, 734-764-0304

Thank you for your time and consideration.

Respectfully,

Alec Zatirka

Alec Zatirka

533 S 4th Ave Apt 1, Ann Arbor, MI
734-306-0849 • azatirka@umich.edu
(he/him)

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Expected May 2022
Activities: Michigan Journal of Gender & Law, Managing Production Editor
Michigan Journal of Law & Society, Associate Editor (inaugural class)
For Your Information Program, 2021 – 22 Section Leader

WAYNE STATE UNIVERSITY — Detroit, MI
Bachelor of Arts in Political Science & Economics, *cum laude* — May 2018
Honors: Angela Rose Cowan Award, Honorable Mention (Best Political Science undergrad paper)
Finalist, Bowling Green State University Undergraduate Economics Conference and Competition

EXPERIENCE

MILBANK LLP — New York, NY
Summer Associate — May 2021-July 2021

UNIVERSITY OF MICHIGAN, OFFICE OF THE VICE PRESIDENT & GENERAL COUNSEL — Ann Arbor, MI
Law Clerk — May 2020 – April 2021
- Conducted legal research and drafted memos and advisory guidance for OGC attorneys and clients
- Completed original historical research on legislative intent of University bylaw
- Advised clients on COVID19 exigencies including complying with executive orders and modified regulatory regimes
- Prepared form documents and advisory memos for privacy and technology issues

UNITED STATES ATTORNEY'S OFFICE – EASTERN DISTRICT OF MICHIGAN — Detroit, MI
Legal Assistant — October 2018 – July 2019
- Prepared and processed legal documents for civil bankruptcy and criminal monetary activity cases
- Drafted and served civil subpoenas and reviewed returns in support of restitution enforcement
- Performed miscellaneous administrative tasks including filing court documents via ECF

MICHIGAN GAMING CONTROL BOARD — Detroit, MI
Licensing Coordinator — October 2017 – October 2018
- Processed Millionaire Party license applications and post-event financial statements
- Executed special projects assigned by Enterprise Licensing manager
- Promoted from Student Assistant

ERIE SHORES COUNCIL – PIONEER SCOUT RESERVATION — Pioneer, OH
Assistant Ranger — August 2014 – August 2017
- Supervised and trained new ranger staff in completion of assigned duties including overseeing a kitchen feeding 300+ people, maintaining camp buildings and equipment, and purchasing supplies

ADDITIONAL

Volunteer: Pioneer Scout Reservation (2017 – Present)
Interests: Tabletop Role-Playing Games (D&D), Weightlifting, and Baking
Other: Eagle Scout, Order of the Arrow

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Transcript of: Alec J Zatirka

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The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Zatirka,Alec J
Student#: 81730046

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	A-
LAW	530	004	Criminal Law	David Uhlmann	4.00	4.00	4.00	B+
LAW	580	004	Torts	Margo Schlanger	4.00	4.00	4.00	A-
LAW	593	015	Legal Practice Skills I	Mark Osbeck	2.00		2.00	S
LAW	598	015	Legal Pract:Writing & Analysis	Mark Osbeck	1.00		1.00	S
Term Total				**GPA: 3.566**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.566**		**12.00**	**15.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	520	001	Contracts	Albert Choi	4.00		4.00	PS
LAW	540	005	Introduction to Constitutional Law	Julian Davis Mortenson	4.00		4.00	PS
LAW	594	015	Legal Practice Skills II	Mark Osbeck	2.00		2.00	PS
LAW	742	001	Prisons and the Law Colloq	Margo Schlanger	1.00		1.00	PS
LAW	779	001	Prisons and the Law	Margo Schlanger	3.00		3.00	PS
Term Total					**14.00**		**14.00**	
Cumulative Total				**GPA: 3.566**		**12.00**	**29.00**	

Continued next page >

Control No: E183949601 Issue Date: 06/07/2021 Page 2

The University of Michigan Law School
Cumulative Grade Report and Academic Record

Name: Zatirka,Alec J
Student#: 81730046

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	536	001	Nat'l Security & Civ Liberties	Barbara Mcquade	3.00	3.00	3.00	B+
LAW	675	001	Federal Antitrust	Daniel Crane	3.00	3.00	3.00	B
LAW	723	001	Corporate Lawyer: Law & Ethics	Vikramaditya Khanna	4.00	4.00	4.00	A-
LAW	835	001	Law & Econ Development: India	Vikramaditya Khanna	2.00	2.00	2.00	A-
LAW	885	004	Mini-Seminar Pandemics and Law in Science Fiction	Nicholson Price	1.00		1.00	S
Term Total				**GPA: 3.425**	**13.00**	**12.00**	**13.00**	
Cumulative Total				**GPA: 3.495**		**24.00**	**42.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	486	001	Couns & Advocacy in Antitrust	Steven Cernak	2.00	2.00	2.00	A-
LAW	569	002	Legislation and Regulation	Nina Mendelson	4.00	4.00	4.00	B+
LAW	669	001	Evidence	Eve Primus	4.00	4.00	4.00	B+
LAW	751	001	Accounting for Lawyers	James Desimpelare	3.00	3.00	3.00	B
LAW	885	007	Mini-Seminar Race, Gender, and American Incarceration	Margo Schlanger	1.00		1.00	S
Term Total				**GPA: 3.292**	**14.00**	**13.00**	**14.00**	
Cumulative Total				**GPA: 3.424**		**37.00**	**56.00**	

Continued next page >

Control No: E183949601 Issue Date: 06/07/2021 Page 3

The University of Michigan Law School
Cumulative Grade Report and Academic Record

Name: Zatirka,Alec J
Student#: 81730046

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
Elections as of:	06/07/2021							
LAW	477	001	Antitrust:Mergers&Acquisitions	John Nannes	1.00			
LAW	677	001	Federal Courts	Leah Litman	4.00			
LAW	920	001	Civil-Criminal Litigation Clnc	David Santacroce Allison Freedman	4.00			
LAW	921	001	Civil-Criminal Litig Clnc Sem	David Santacroce Allison Freedman	3.00			

End of Transcript
Total Number of Pages 3

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University of Michigan Law School
Grading System

Honor Points or Definitions

Through Winter Term 1993		Beginning Summer Term 1993	
A+	4.5	A+	4.3
A	4.0	A	4.0
B+	3.5	A-	3.7
B	3.0	B+	3.3
C+	2.5	B	3.0
C	2.0	B-	2.7
D+	1.5	C+	2.3
D	1.0	C	2.0
E	0	C-	1.7
		D+	1.3
		D	1.0
		E	0

Other Grades:

F Fail.

H Top 15% of students in the Legal Practice courses for students who matriculated from Spring/Summer 1996 through Fall 2003. Top 20% of students in the Legal Practice courses for students who matriculated in Spring/Summer 2004 and thereafter. For students who matriculated from Spring/Summer 2005 through Fall 2015, "H" is not an option for LAW 592 Legal Practice Skills.

I Incomplete.

P Pass when student has elected the limited grade option.*

PS Pass.

S Pass when course is required to be graded on a limited grade basis or, beginning Summer 1993, when a student chooses to take a non-law course on a limited grade basis.* For SJD students who matriculated in Fall 2016 and thereafter, "S" represents satisfactory progress in the SJD program. (Grades not assigned for LAW 970 SJD Research prior to Fall 2016.)

T Mandatory pass when student is transferring to U of M Law School.

W Withdrew from course.

Y Final grade has not been assigned.

* A student who earns a grade equivalent to C or better is given a P or S, except that in clinical courses beginning in the Fall Term 1993 a student must earn a grade equivalent to a C+ or better to be given the S.

MACL Program: HP (High Pass), PS (Pass), LP (Low Pass), F (Fail)

Non-Law Courses: Grades for these courses are not factored into the grade point average of law students. Most programs have customary grades such as A, A-, B+, etc. The School of Business Administration, however, uses the following guides: EX (Excellent), GD (Good), PS (Pass), LP (Low Pass) and F (Fail).

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University of Michigan Law School
625 S. State St.
Ann Arbor, MI 48109

Margo Schlanger
Wade H. and Dores M. McCree Collegiate Professor of Law
mschlan@umich.edu; 202-277-2506

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

This is a letter in support of my student Alec Zatirka's application for a clerkship in your chambers. Alec is due to graduate next spring. He is smart, quick, and hard-working and I think he'll be a terrific law clerk.

I know Alec from three classes—Torts, his first semester; Prisons and the Law, his second semester; and a mini-seminar titled "Race, Gender, and American Incarceration," last semester.

He is the kind of student it is a pleasure to teach—prepared and engaged. As his transcript indicates, in Torts, his class participation and exam were both very good. Prisons and the Law was not graded, because of the COVID-19 pandemic. I can assure you, though, that Alec again did very good work—not only in the regular class, but also in a 1-credit add-on. This add-on was a kind of externship, associated with the class, in which I found class-related placements for students. Alec worked for the Civil Rights Education and Enforcement Center (CREEC), doing legal research on Colorado Department of Corrections grievance policies and dismissals of cases based on prisoner failure to exhaust the administrative process prior to filing. CREEC's legal director, who supervised his work, described his research as "right on point" and his write-ups as "good and helpful." We don't evaluate any student work in our mini-seminars (that's why they too, are pass/fail), but Alec's participation in class was spot-on.

If you look at Alec's resume, you'll see that he's got an admirable work history. And if you talk to him about it, the theme that emerges is that he's all about getting the work done, competently and without drama. This fits with what I've learned about him. He is a really nice guy, very personable and very undramatic. I think he would be a pleasure to have around chambers.

I would be pleased to speak with you further about Alec. Please feel free to contact me via phone or email.

Yours,

Margo Schlanger

David E. Grimm, Esq.

9080 Sundance Trail | Dexter, MI 48130 | (617) 538-0272

June 7, 2021

To Whom It May Concern:

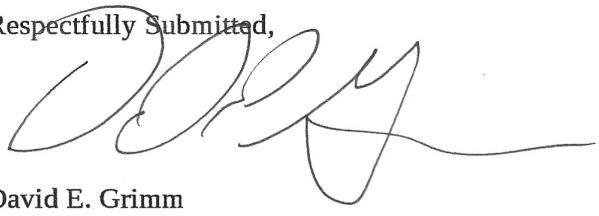
I write this personal recommendation on behalf of Alec Zatirca.

While I have only known Alec professionally for a little over a year, his eagerness to learn and aptitude for legal research was immediately clear to me from the first time I met him. As a law clerk for the University of Michigan Office of the Vice President & General Counsel, Alec worked on many discrete projects for attorneys throughout the office. He consistently received praise for his work and sought out individualized feedback regarding his research and analysis.

As a law clerk, Alec was asked routinely to stretch his comfort levels and research new and novel areas of the law. Alec met those challenges head on and never hesitated to dig into a topical area despite being unfamiliar with the same. His work was also timely and concise, which was appreciated by both myself and other colleagues throughout the office. Put succinctly, his growth as a legal scholar during the time I have known him is impressive.

Given my professional experience with Alec, his growth as a student during law school, and his growth as a law clerk over the last year, I have no reservations in recommending Alec for the position of judicial clerk. Should you have any questions for me or want to discuss Alec's candidacy further, please do not hesitate to contact me at the address or phone number listed above.

Respectfully Submitted,



David E. Grimm

UNIVERSITY OF MICHIGAN LAW
Legal Practice Program
625 South State Street
Ann Arbor, Michigan 48109-1215

Mark K. Osbeck
Clinical Professor of Law

June 10, 2021

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige, Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

A former student of mine, Alec Zatirka, is applying to serve as one of your law clerks, and he has asked me to prepare a letter of recommendation on his behalf. I am happy to do so.

Mr. Zatirka was a student in my two-semester Legal Practice class at Michigan. This class teaches first-year students the fundamentals of legal analysis, legal research, legal writing, oral argument, negotiation, and other skills related to the practice of law. Mr. Zatirka was a very good student. He has strong research and analytical skills. He is also a skilled writer and an effective oral advocate. He expresses arguments clearly, and he demonstrates the ability to explain difficult concepts in a simple way. He is meticulous in his work.

I met with Mr. Zatirka at length on several occasions during the class to discuss his work. In these discussions, he impressed me both with his thorough understanding of the legal issues involved, as well his ability to fairly evaluate both sides of an argument, while still forcefully articulating his position. That ability should prove a significant asset as a judicial clerk.

Mr. Zatirka is also an amiable person. And he has already garnered some very good work experience during law school, such as the University of Michigan's Office of General Counsel. He also seems highly committed to career success as a lawyer. Finally, Mr. Zatirka strikes me as a person of high character and integrity.

In sum, I am confident that Mr. Zatirka will make a very good judicial clerk, and I am pleased to recommend him to you. Please do not hesitate to e-mail or call me if I can answer any questions you might have about Mr. Zatirka.

Sincerely,

/Mark K. Osbeck/

Mark K. Osbeck
Clinical Professor of Law

Mark Osbeck - mosbeck@umich.edu - 734-764-9337

Alec Zatirka
533 S 4th Ave Apt 1, Ann Arbor, MI
734-306-0849 • azatirka@umich.edu
(he/him)

Dear Judge:

Below please find my writing sample. The piece was written for a practicum class called "Counseling and Advocacy in Antitrust." It was drafted as the final assignment for the course, building on the earlier simulations conducted in the class.

The context of the memo is that I was hired as outside counsel to advise a manufacturer of heavy-duty automatic truck transmissions, Anniston Automatic, on the antitrust risks of a proposed discount program. I was instructed to write a memo on the risks of the program for the firm's General Counsel, assuming he had knowledge of basic antitrust principles but nothing more. We were given a limited list of sources to cite too, with no additional research allowed. The memo was required to be single spaced, and no more than five pages, including any headers and sub-headers. For ease of reading I have reformatted the memo to be double spaced. The piece is solely my work and has been neither edited nor reviewed by anyone else.

Respectfully,

Alec Zatirka

TO: JACK JACOBSON
FR: ALEC ZATIRKA
DA: MAY 6, 2021
RE: ANTITRUST RISK FROM ANNISTON ADVANTAGE DISCOUNT PROGRAM

QUESTION PRESENTED

Anniston recently instituted a loyalty discount program to encourage truck manufacturers to purchase more automatic transmissions. Several market participants have expressed concerns that the Anniston Advantage Program may be anticompetitive, with some going so far as to threaten a lawsuit if Anniston does not rescind the Program or substantially modify its terms. How much legal risk does the Program represent to Anniston? And what, if any, modifications can be made to the Program to reduce this risk?

SHORT ANSWER

The Anniston Advantage Program presents a medium to high level of antitrust liability to Anniston. However, there are ways Anniston could modify the Program to mitigate this risk of liability. Courts traditionally apply one of two tests when determining whether a discount program violates the antitrust statutes. These are the "price-cost test" and the "foreclosure test," with neither test coming from the statutory text. Rather, these tests have been developed by federal courts in response to repeated suits alleging anticompetitive conduct through predatory-pricing and exclusive dealing respectively. The Supreme Court has never definitively stated which is the appropriate test to apply for monopolization through loyalty discounting cases. Regardless of which test is applied, the Anniston Advantage Program, without appropriate mitigating measures, presents a medium to high level of antitrust liability to Anniston.

FACTS

As the structure of the Anniston Advantage Program is well known, only key facts will be reiterated here as a refresher. The Program provides that truck manufacturers who purchase automatic transmissions from Anniston may qualify for a 20 percent discount on every transmission bought during the discount period, with the discount period being one year. To qualify for the discount, a manufacturer must reach 50 percent automaticity (the usage rate of automatic compared to manual transmissions) in each industry or vocation it produces trucks for. The manufacturers must also purchase 90 percent of their total automatic transmissions from Anniston. Failure to satisfy either of these requirements results in the manufacturer forfeiting the discount for the entire discount period across every vocation produced in. The Department of Justice also called Anniston a monopolist when threatening to block the attempted acquisition of Anniston by ZF, Anniston's main competitor in the automatic transmission market.

DISCUSSION

Section 2 of the Sherman Act makes it unlawful for a firm to "monopolize, or attempt to monopolize" trade in a specified market. 15 U.S.C. § 2. Under §2 a plaintiff must prove the defendant is a monopolist who is taking action to maintain that monopoly. A firm is a monopolist when it can price its products without regard to what its competitors are doing. This can be difficult to prove so an alternative pathway to prove monopoly is to show that a firm has some critical mass of market share, usually around 50 to 60 percent. As mentioned above, the Department of Justice considered Anniston to be a monopolist in certain vocational markets for automatic transmissions. Given this, for purposes of this memo we shall assume a court would determine that Anniston is a monopolist in any subsequent suit involving the market for automatic transmissions. We will first describe the two tests that could be applied before

applying each test to the Anniston Advantage Program. We will conclude with some recommendations on how to reduce the antitrust liability risk of the program.

A. Price-Cost Test

A court could use the price-cost test when evaluating whether the Anniston Advantage Program violates §2. The price-cost test has been endorsed by the Supreme Court, first being applied in *Brooke Group. Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). There Brooke Group alleged that defendant Brown and Williamson Tobacco was using volume rebates to engage in an illegal predatory pricing scheme. Such a scheme would involve a firm pricing its goods below cost on the theory that other firms will not be able to compete, and will eventually be forced to exit the market. Once the other firms have exited the market, the predatorily pricing firm can then raise costs to supracompetitive levels and recoup the profits lost during the first part of the scheme. However, the Supreme Court considered price discounts to be one of the essential modes of competition and generally beneficial to consumers since they then realize lower prices. This belief, combined with the axiomatic belief that antitrust laws protect competition and not competitors, *Id.* at 224, results in a test that is difficult for plaintiffs to satisfy. To meet the test from *Brooke Group*, a plaintiff must show that A) the defendant is pricing its products below some measure of costs and, B) that the defendant has a dangerous probability of recouping the losses from selling below costs. *Id.* at 223-25.

The first factor of the test, what is the appropriate measure of cost to use for determining when a firm is pricing below cost, is settled. The theoretical measure would be whether a firm is selling below its marginal cost. Since that number is not determinable from standard accounting procedures, courts have instead adopted average variable cost as the threshold amount. *Cascade Health Solutions v. PeaceHealth*, 502 F.3d 895, 920 (9th Cir. 2007). The second prong of the

test, the defendant's dangerous probability of recoupment, is helpful to a party like Anniston. This factor requires the plaintiff to show that the defendant has a dangerous probability of recouping their lost profits after the competition has exited the market. Economic realities make this prong challenging to plead, let alone prove at trial. The structure of the price-cost test makes it a preferrable test for Anniston. However, it is not the only test used by courts.

B. Foreclosure Test

An alternative to the price-cost test is the foreclosure test. Originally applied in exclusive dealing circumstances, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), it has been applied in bunding and loyalty discount cases as well. *See, e.g.*, *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Circ. 2000); *LePage's, Inc. v. 3M*, 324 F.3d 141 (3d Circ. 2003). The foreclosure test evaluates whether a firm's conduct "tends to substantially foreclose competition in the relevant [competitive] market." *Tampa Electric*, 365 U.S. at 334. In *Tampa Electric*, the plaintiff entered into a twenty-year supply contract for coal with a local producer. *Id.* at 322-23. The supply contract was for an absolutely large amount of coal and foreclosed competition for Tampa Electric's business for twenty years. However, when measured relative to the whole market, foreclosure from competition was trivial. *Id.* at 324. Therefore, the court held the contract not to violate antitrust laws.

In *Tampa Electric* the Supreme Court focused on the share of the market foreclosed by the supply contract. Recent cases take a more nuanced approach to the foreclosure analysis, looking not to just to the share of the market removed from competition, but also to broader competitive harms and justifications. *E.g. McWane, Inc. v. FTC*, 783 F.3d 814 (11th Cir. 2015). *McWane* is emblematic of this development. Although the circuit court rested their conclusion on the share of the market foreclosed by McWane's actions, the dissent at the agency level proposed

a two-pronged inquiry. The agency's proposed first prong was to not look for indirect evidence of foreclosure but to instead look for direct evidence of competitive harm. *Id.* at 822. The second prong was whether a market entrant could reach minimum efficient scale to compete. *Id.* Though not dispositive in this case, these factors are representative of those considered in other instances.

C. The Anniston Advantage Program

Loyalty discounting programs have characteristics similar to exclusive dealing and predatory pricing. This leads to uncertainty about what test a court would apply and what outcome a court would reach under that test. We will therefore apply both tests to the Anniston Advantage Program.

Price-Cost Test

The price-cost test has been endorsed by the Supreme Court. *Brooke* Group, 509 U.S. at 209. Lower courts have been more sparing in their usage of this test. The Ninth Circuit applied the price-cost test in a tying/bundle discount case. *Cascade Health Solutions*, 502 F.3d at 895. In *Cascade Health*, the parties were the only providers of primary and secondary medical care in the relevant geographic market. *Id.* at 902. In addition, defendant PeaceHealth offered tertiary care whereas plaintiff Cascade Health did not. Defendant offered insurance companies discounts on all services if the insurance company listed PeaceHealth as the sole preferred provider in the market. Plaintiff alleged that this bundling effectively precluded it from competing in the primary and secondary care markets. *Id.*

The Ninth Circuit agreed with the plaintiff that PeaceHealth's bundling could violate antitrust laws. *Id.* at 928-29. In doing so the court used a variant of the price-cost test. Specifically, for bundle discount programs, the court found that "[t]o prove that a bundled

discount was exclusionary or predatory for the purposes of a monopolization or attempted monopolization claim under § 2 of the Sherman Act, the plaintiff must establish that, after allocating the discount given by the defendant on the entire bundle of products to the competitive product or products, the defendant sold the competitive product or products below its average variable cost of producing them." *Id.* at 920.

Applying this test to the Anniston Advantage Program leads to uncertain results. As mentioned above, Anniston's production costs would have to be known. If Anniston's costs are above the price of transmissions sold, it would likely result in antitrust liability. The inverse is true as well, if Anniston's costs are below the discounted price, it would not face liability. Given that the current discount is 20 percent, absent data to the contrary a court may be likely to infer that such a steep discount puts the sale price below average variable cost. This inference is even more likely given that Anniston's internal materials indicate that the discount will not be available on parts sales or military vehicles, with these sales keeping the company profitable.

In determining which test a court might apply, it is worth noting that *Cascade Heath* came out of the Ninth Circuit, a circuit in which Anniston is unlikely to face suit. The price-cost test has been endorsed by the Supreme Court and, given that Justice Alito indicated distaste for the foreclosure test while on the Third Circuit, *Lepage's*, 324 F.3d at 170 (Greenberg, J., dissenting) (dissent joined by Alito, J.), it would likely be upheld as the preferred test if another case makes it to the Supreme Court. However, lower courts have been hesitant to apply this test in circumstances beyond those where price is the sole tool of anticompetitive conduct. The alternative is the foreclosure test, which we apply to the Anniston Advantage Program next.

Foreclosure Test

The foreclosure test has been used in loyalty discounting cases, though often with other animating factors beyond the market share analysis seen in *Tampa Electric*. Notably it has been repeatedly applied by the Third Circuit. *See, e.g.*, *LePage's*, 324 F.3d at 141; *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394 (3d Cir. 2016). That circuit has adopted the view that a foreclosure inquiry is preferred when the alleged violator is a monopolist instead of part of an oligopoly. *LePage's*, 324 F.3d at 151-52. Though the results vary across the cases, this repeated application merits special attention since Anniston is (presumably) a Delaware corporation and could very likely face suit in the Third Circuit.

Before discussing several Third Circuit cases, we would first like to discuss an otherwise informative case from the Eighth Circuit. *Concord Boat* used several factors when evaluating the plaintiff's theory of harm, looking to share of the market foreclosed, barriers to entry, and duration and coerciveness of the discount agreement. *Concord Boat Corp.*, 207 F.3d at 1058-59. A market with high barriers to entry will be more susceptible to monopolization through discounting since new entrants will be less likely, thus lowering the risk to the monopolist. *Id.* Similarly, duration of the agreement matters because competition will be greater when entities are not locked into long agreements. *Id.* Approximating market share foreclosed via the purchase requirement in the discount agreement, in addition to the other market factors, the court concluded that a 70 percent purchase requirement to get a one to three percent discount to not be anticompetitive**.** The court ultimately held that the defendant had not foreclosed enough of the market to violate §2. *Id.* at 1062-63.

ZF Meritor v. Eaton also saw a court embracing the foreclosure test over price-cost in evaluating a loyalty discount. There the court determined Eaton's discount contract to be a

partial de facto exclusive dealing contract. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 269-70 (3d Cir. 2012). This led to the belief that the harm originated not from discounting but from excluding competition. The court used this as its basis for applying the foreclosure test. *Id.* Contributing to the court's conclusion were the facts that Eaton's contracts were of a 2-5 year duration, required large purchase percentages, had exclusionary terms relating to the marketing of competitors' products, and a payback provision for discounts given when the purchaser does not meet their purchase goals. *Id.* at 265. The truck manufacturers also feared being cutoff from Eaton, essentially killing their business, if they did not agree to the discount deal, though Eaton contested this. *Id.* at 285. These factors all contributed to the court holding Eaton's conduct violated §2.

Contrast *ZF Meritor* with another Third Circuit case, *Eisai*. There the court rejected the lower courts application of the price-cost and foreclosure tests, opting instead to just apply the latter. *Eisai, Inc.*, 821 F.3d at 408-09. Sanofi structured its discount contracts so hospitals did not feel they had to participate to continue to have access to Sanofi's products. *Id.* at 400-01. Part of this structure included allowing hospitals to continue listing other firms' drugs. *Id.* These factors, combined with the court's rejection of the plaintiff's theory of misinformation as mere competitive advertising, led the court to hold Sanofi's discount agreements did not violate §2. *Id.* at 399.

The Anniston Advantage Program poses significant risk under a foreclosure test analysis. The requirement that manufacturers must attain 50 percent automaticity in each vocation, and purchase 90 percent of their total automatic transmissions from Anniston, makes the Program appear more like the one in *ZF Meritor* than *Eisai.* Moreover, the 20 percent discount seems coercive, as a manufacturer would not be able to compete on price if it does not take the discount

but its competitors do. The one-year duration does militate against liability. However, the fact that failure to reach the automaticity or purchase targets in one vocation can lead to Anniston recouping the discounts across all vocations for the entire duration of the Program makes antitrust liability more likely. Thus, absent any changes, a foreclosure test analysis makes the Anniston Advantage Program a risky endeavor for Anniston.

D. Risk Reducing Measures

Anniston can take steps to reduce the legal risk from the Anniston Advantage Program. Making the overall duration of the Program shorter would make it less preclusive. The 20 percent discount is substantially higher than the discounts upheld in *Eisai* and *Concord Boat*, and is a strong indicator that Anniston is not meeting its cost, as well as suggesting the Program is coercive. Reducing the discount would eliminate the likelihood that Anniston is selling below its cost. As seen in *Eisai*, cutting the discount rate, combined with reassuring manufacturers that they will not be cutoff from Anniston's supply chain if they do not participate and can continue to market competitors' automatic transmissions, would make the Program appear much less coercive. Eliminating the claw back provision for discounts would reduce the coerciveness as well. These changes, as well as making the discount less homogenous, will help make the program less risky as manufacturers will be less likely to feel pressured to buy from Anniston lest they endure a penalty. These changes do not completely eliminate the antitrust risk from the Anniston Advantage Program, but they do make the program similar to other loyalty discounts that have been upheld.

CONCLUSION

The Anniston Advantage Program poses a medium to high legal risk to Anniston. Of the two tests the Program could be evaluated under, the price-cost test would be the most lenient towards Anniston. Though this test has been endorsed by the Supreme Court in other contexts, and given certain Justices' prior statements, likely would be endorsed in this instance, lower courts have rarely applied it in cases where anything other than price is at issue. Instead, courts have applied the foreclosure test. This test has been repeatedly used in the Third Circuit, where Anniston is likely to face suit. As such Anniston should anticipate it being applied to the Anniston Advantage Program. Enacting the changes suggested above would make the Program less legally risky. All risk can never be eliminated though, and given Anniston's assumed position as a monopolist in the relevant market and the accompanying scrutiny, we would counsel that Anniston adopt the most risk adverse format of the Program possible.

Applicant Details

First Name	**Keon**
Last Name	**Zemoudeh**
Citizenship Status	**U. S. Citizen**
Email Address	**keon.zemoudeh.2021@lawmail.usc.edu**
Address	**Address** **Street** **236 S Los Angeles St., Apt 413** **City** **Los Angeles** **State/Territory** **California** **Zip** **90012** **Country** **United States**
Contact Phone Number	**9496162813**

Applicant Education

BA/BS From	**University of California-Santa Barbara**
Date of BA/BS	**June 2018**
JD/LLB From	**University of Southern California Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90513&yr=2009**
Date of JD/LLB	**May 16, 2021**
Class Rank	**I am not ranked**
Law Review/ Journal	**Yes**
Journal(s)	**Southern California Review of Law and Social Justice**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Registered Patent Agent at the United States Patent and Trademark Office**

Recommenders

Brown, Marc
mbrown@law.usc.edu

References

Professor Natalie Kouyoumdjian, (818) 515-1188, nkouyoumdjian@law.usc.edu

Kathryn Barnes, (802) 279-4954, kathryn.barnes@kcrw.org

Professor Doug Bradley, (805) 680-2333, doug@dougbradley.net

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Keon Zemoudeh

236 S Los Angeles St. • Los Angeles, CA 90012 • keon.zemoudeh.2021@lawmail.usc.edu • (949) 616-2813

May 29, 2021

The Honorable Elizabeth W. Hanes
Spottswood W. Robinson III and Robert R. Merhige, Jr., Federal Courthouse
701 East Broad Street
Richmond, VA 23219

Dear Judge Hanes:

I am writing to apply for a clerkship in your chambers for the 2022-2024 term. I graduated from the University of Southern California Gould School of Law in May 2021.

Enclosed please find my resume, law school and undergraduate transcripts, and writing sample. The writing sample, which is from my Legal Research, Writing & Advocacy course, examines whether a contract term is procedurally unconscionable. Also enclosed are letters of recommendation from the following people:

Prof. Roman Melnik	Prof. Marc Brown
USC Gould School of Law	USC Gould School of Law

I want to practice patent litigation in my career. I am specifically interested in clerking for you in the Eastern District of Virginia because I hope to gain experience in patent litigation matters during my clerkship.

Thank you for your consideration. Please let me know if I can provide any further information.

Respectfully,

Keon Zemoudeh

Keon Zemoudeh

236 S Los Angeles St. • Los Angeles, CA 90012 • keon.zemoudeh.2021@lawmail.usc.edu • (949) 616-2813

EDUCATION

University of Southern California Gould School of Law
Juris Doctor May 2021

GPA:	3.45
Honors:	*Southern California Review of Law and Social Justice*, staff
High Honors Grades:	Patent Law; Patent Drafting & Prosecution; Computer Science for Lawyers
Honors Grades:	Legal Research, Writing & Advocacy I/II; Business Organizations; Criminal Procedure; Community Property; Bioethics and the Law
Activities:	Phi Alpha Delta, Treasurer; Music Law Society, 1L Representative
Certificates:	Peak Performance

University of California, Santa Barbara
Bachelor of Science in Biological Sciences June 2018

GPA:	3.80 *High Honors*
Honors:	Honors Program – College of Letters & Science Dean's List (7 Quarters)

EXPERIENCE

USC Intellectual Property & Technology Law Clinic Los Angeles, CA
Law Clerk August 2020 – May 2021

- Wrote *amicus curiae* merits brief in Supreme Court of the United States (*United States v. Arthrex, Inc.*) on importance of *inter partes* review for fostering innovation
- Wrote DMCA expansion petition to Copyright Office regarding medical device data

Justice Law Corporation Pasadena, CA
Law Clerk February 2020 – February 2021

- Wrote opposition to motion to compel arbitration and dismiss in Federal District Court
- Wrote motions to lift stays, oppositions to motions to strike, demurrers to answers

Orange County Superior Court, Criminal Panel Fullerton, CA
Judicial Extern to the Honorable David Hesseltine June 2019 – July 2019

- Wrote bench memoranda for unlimited civil court; Deliberated in mock jury

Briggs Laboratory at UCSB Santa Barbara, CA
Molecular Researcher August 2017 – October 2017

- Extracted and analyzed DNA (qPCR) from frog tissue samples for pathogenesis data

ADMISSIONS: United States Patent and Trademark Office, Patent Agent
LANGUAGES: Farsi (fluent speaker); Spanish (intermediate)
INTERESTS: Piano (Level 9); Skiing; Chess; Basketball

UNIVERSITY OF SOUTHERN CALIFORNIA
OFFICIAL ACADEMIC TRANSCRIPT

OFFICE OF THE REGISTRAR
LOS ANGELES, CA 90089-0912
(213) 740-7445

STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Zemoudeh, Keon	7974-3815-93	01-14-2021	1 of 3

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

ISSUE TO:

CONTROL #: 000002269475

RAISED SEAL NOT REQUIRED

This transcript is not valid without the university seal and the signature of the Registrar. A raised seal is not required.

Frank Chang
Registrar

---------- Current Program of Study ----------

02/20/2018 Juris Doctor — Law

---------- USC Cumulative Totals ----------

Law Units Attempted: 74.0 Earned: 74.0 Available: 74.0 GPA Units: 48.0 Grade Points: 165.80 GPA: 3.45

Fall Semester 2018 (08-20-2018 to 12-12-2018)

LAW-515	3.7	3.0	Legal Research, Writing, and Advocacy I
LAW-507	3.2	4.0	Property
LAW-503	3.1	4.0	Contracts
LAW-502	3.0	4.0	Procedure I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	15.0	48.30	3.22

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STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Zemoudeh, Keon	7974-3815-93	01-14-2021	2 of 3

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Spring Semester 2019 (01-07-2019 to 05-10-2019)

LAW-516	3.7	2.0	Legal Research, Writing, and Advocacy II
LAW-509	3.3	4.0	Torts I
LAW-508	3.1	3.0	Constitutional Law: Structure
LAW-505	3.4	3.0	Legal Profession
LAW-504	3.4	3.0	Criminal Law

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
15.0	15.0	15.0	50.30	3.35

Summer Semester 2019 (05-15-2019 to 08-15-2019)

LAW-781	CR	4.0	Externship I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
4.0	4.0	0	0	0.00

Fall Semester 2019 (08-26-2019 to 12-18-2019)

LAW-705	3.5	2.0	Community Property
LAW-603	3.5	4.0	Business Organizations
LAW-602	3.6	4.0	Criminal Procedure
LAW-732	3.7	3.0	Bioethics and Law Seminar (Regulating Ethical Policies)
LAW-678A	CR	1.0	Review of Law and Social Justice Staff

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
14.0	14.0	13.0	46.50	3.57

UNIVERSITY OF SOUTHERN CALIFORNIA
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STUDENT NAME	STUDENT NUMBER	DATE	PAGE
Zemoudeh, Keon	7974-3815-93	01-14-2021	3 of 3

NOTE: PHOTOCOPIES ARE NOT TO BE CONSIDERED OFFICIAL TRANSCRIPTS.THE REGISTRAR'S SEAL AND SIGNATURE APPEAR ON THE FIRST PAGE.

Spring Semester 2020 (01-13-2020 to 05-15-2020)

Grades of Credit/No Credit were required in Spring 2020 in response to COVID-19 global pandemic.

LAW-765	CR	3.0	Topics in Intellectual Property Law
LAW-709	CR	2.0	Contract Drafting and Negotiation
LAW-673	CR	4.0	Deal Strategies in Business and Entertainment Law
LAW-532	CR	3.0	Constitutional Law: Rights
LAW-678B	CR	1.0	Review of Law and Social Justice Staff

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
13.0	13.0	0	0	0.00

Fall Semester 2020 (08-17-2020 to 12-16-2020)

Grades of Credit/No Credit were required in Fall 2020 in response to COVID-19 global pandemic.

LAW-810	4.2	4.0	Patent Law
LAW-730	3.9	1.0	Computer Science for Lawyers
LAW-607	CR	3.0	Gifts, Wills, and Trusts
LAW-771	CR	5.0	Intellectual Property and Technology Law Clinic I

Term Units Attempted	Term Units Earned	Term GPA Units	Term Grade Points	Term GPA
13.0	13.0	5.0	20.70	4.14

---------- End Of Transcript ----------

ACADEMIC TRANSCRIPT INFORMATION

NOTE: The information that follows represents current University policies. Questions regarding historical University policies and or transcript notations should be addressed to the Office of the Registrar. This document contains a number of security features. Further information or authentication can be obtained by calling the Office of the Registrar (213) 740-8338.

COURSE CREDIT/UNIT VALUE
A semester unit is a credit of one hour per week for one semester (15 weeks in length).

COURSE NUMBERING AND CLASSIFICATION
The first digit of the course indicates the year level of the course: 000-preparatory courses; 100-first undergraduate year; 200-second undergraduate year; 300-third and fourth undergraduate years without graduate credit; 400-third and fourth undergraduate year with graduate credit for graduate students; 500-first graduate year; 600-second graduate year; and 700-third graduate year.

GRADING SYSTEM
The following grades are used: A, excellent; B, good; C, fair in undergraduate courses and minimum passing in courses for graduate credit; D, minimum passing in undergraduate courses; and F, failed. Additional grades include CR, credit; NC, no credit; P, pass; and NP, no pass.
The following marks are also used: W, withdrawn; IP, in progress; UW, unofficial withdrawal; MG, missing grade; IN, incomplete; and IX, lapsed incomplete.

GRADE POINT AVERAGE (GPA) CATEGORIES/CLASS LEVEL
A system of grade points is used to determine a student's grade point average. Grade points are assigned to grades as follows for each unit in the credit value of a course: A, 4.0 points; A-, 3.7 points; B+, 3.3 points; B, 3.0 points; B-, 2.7 points; C+, 2.3 points; C, 2.0 points; C-, 1.7 points; D+, 1.3 points; D, 1.0 point; D-, 0.7 points; F, 0 points; UW, 0 points; and IX, 0 points. Marks of CR, NC, P, NP, W, IP, MG and IN do not affect a student's grade point average.
There are four categories of class level and GPA: Undergraduate, Graduate, Law, and Other. UNDERGRADUATE is comprised of freshman (less than 32 units earned), Sophomore (32 to 63.9 units earned), Junior (64 to 95.9 units earned) and Senior (at least 96 units earned). GRADUATE is comprised of any coursework attempted while pursuing a master's and or doctoral degree. LAW is comprised of any coursework attempted while pursuing a Juris Doctor or Master of Laws degree. OTHER is comprised of any coursework attempted while not admitted to a degree program or coursework not available for degree credit.

CLASS RANK
The University of Southern California does not calculate or support a class rank for its undergraduate students. While most graduate programs do not rank students, requests for graduate student class rankings should be directed to the dean of the particular school in which the graduate degree was earned.

STUDENT GOOD STANDING
A student is considered to be in good academic standing if they are eligible to register for classes. Disciplinary good standing is determined by the Office of Student Judicial Affairs and Community Standards.

TRANSFER CREDIT
Coursework accepted from other institutions is summarized into undergraduate and graduate areas. The summary information includes the number of units and GPA. The transfer institution(s) and dates of attendance do not appear on the USC transcript.

GOULD SCHOOL OF LAW GRADING SYSTEMS
Beginning in Fall 2012, courses are graded numerically from 4.4 to 1.9, with letter-grade equivalents ranging from A+ to F. The grade equivalents are: 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.1 (C-); 2.0 (D); and 1.9 (F).

From Fall 2001 through Spring 2012, courses were graded numerically from 4.4 to 1.9, with letter-grade equivalents ranging from A+ to F. The grade equivalents were: 4.4 to 4.1 (A+); 4.0 to 3.8 (A); 3.7 to 3.5 (A-); 3.4 to 3.3 (B+); 3.2 to 3.0 (B); 2.9 to 2.7 (B-); 2.6 to 2.5 (C+); 2.4 (C); 2.3 to 2.0 (D); and 1.9 (F).

Prior to Fall 2001, the grading system consisted of numbers in a range from 90 to 65. A grade of 90 was equivalent to highest honors and was very rare; 89 to 85, high honors; 84 to 80, honors; 79 to 70, satisfactory; 69 to 66, unsatisfactory; and 65, failing.

OSTROW SCHOOL OF DENTISTRY GRADING SYSTEM
Students admitted to the Doctor of Dental Surgery program in Fall 1990 or later and students admitted to the International Student Program in Summer 1991 or later are bound by the University's grading system (excluding plus/minus grades), which is detailed above under the heading "GRADING SYSTEM." Academic records for dentistry students who attended prior to the dates listed above are housed independent of the University's central record system. Contact the Ostrow School of Dentistry directly for this earlier academic record information.

KECK SCHOOL OF MEDICINE TRANSCRIPTS
Transcripts for medical students are housed independent of the University's central records system. Contact the School of Medicine directly for this academic record information.

ACCREDITATION
The University of Southern California is fully accredited by the Western Association of Schools and Colleges. For additional professional accreditation information, please refer to the latest issue of Accredited Institutions of Postsecondary Education published by the American Council on Education on Postsecondary Accreditation (COPA).

Rev. 7.2012

UNIVERSITY OF CALIFORNIA SANTA BARBARA

University of California, Santa Barbara
Office of the Registrar, Santa Barbara, CA 93106-2015

PARCHMENT: 32930824

PRINTED: 02/20/21

PAGE: 1

OFFICIAL TRANSCRIPT

STUDENT NAME: KEON K ZEMOUDEH

PERM NUMBER: 760822

SSN: XXX-XX-5984
Birth Date: 11/01/XX

DEGREES AWARDED: 06/15/18

CONFERRED: 06/15/18
COLLEGE: College of Letters and Science
DEGREE: Bachelor of Science
MAJOR: Biological Sciences

English Requirement: Satisfied
Amer Hist Requirement: Satisfied

High Honors
Letters and Science Honors Program completed

COURSE		TITLE	GRADE	COMPLETE UNITS	GPA UNITS	GRADE POINTS	GPA	
2014 Fall Quarter Freshman								
CHEM	1A	GEN CHEM	A	3.0	3.0	12.00		
CHEM	1AL	GEN CHEMISTRY LAB	A+	2.0	2.0	8.00		
MATH	3B	CALC WITH APPLI 2	A-	4.0	4.0	14.80		
MUS	17	WORLD MUSIC	A	4.0	4.0	16.00		
THTR	5	INTRO TO ACTING	A	3.0	3.0	12.00		
		Quarterly Total:		16.0	16.0	62.80	3.92	Deanis Honors
THRU F14		Total:		16.0	16.0	62.80	3.92	
2015 Winter Quarter Freshman								
CHEM	1B	GENERAL CHEMISTRY	A-	3.0	3.0	11.10		
CHEM	1BL	GEN CHEMISTRY LAB	A	2.0	2.0	8.00		
LING	70	LANG IN SOCIETY	A	4.0	4.0	16.00		
PHIL	1	SHORT INTRO TO PHIL	A+	4.0	4.0	16.00		
PSTAT	5A	STATISTICS	A	5.0	5.0	20.00		
		Quarterly Total:		18.0	18.0	71.10	3.95	Deanis Honors
THRU W15		Total:		34.0	34.0	133.90	3.93	
2015 Spring Quarter Sophomore								
CHEM	1C	GEN CHEM	A	3.0	3.0	12.00		
CHEM	1CL	GEN CHEMISTRY LAB	A	2.0	2.0	8.00		
PHIL	100D	PHILOSOPHY OF MIND	A-	4.0	4.0	14.80		
RG ST	81	MODERN IRAN	P	4.0	0.0	0.00		
		Quarterly Total:		13.0	9.0	34.80	3.86	
THRU S15		Total:		47.0	43.0	168.70	3.92	

CONTINUED TO PAGE 2

ISSUED TO:

Keon Zemoudeh

Anthony Schmid
University Registrar

UNIVERSITY OF CALIFORNIA SANTA BARBARA

University of California, Santa Barbara
Office of the Registrar, Santa Barbara, CA 93106-2015

PARCHMENT: 32930824

PRINTED: 02/20/21

PAGE: 2

OFFICIAL TRANSCRIPT

STUDENT NAME: KEON K ZEMOUDEH

PERM NUMBER: 760822

COURSE		TITLE	GRADE	COMPLETE UNITS	GPA UNITS	GRADE POINTS	GPA	
2015 Fall Quarter Sophomore								
CHEM	109A	ORGANIC CHEMISTRY	A	4.0	4.0	16.00		
ENGL	100NA	HONORS SEMINAR	A	1.0	1.0	4.00		Course Honors
ENGL	134NA	ST LIT/ETHNIC COMM	A	4.0	4.0	16.00		Course Honors
MCDB	1A	INTRO BIOLOGY I	B	4.0	4.0	12.00		
MCDB	1AL	INTRO BIOLOGY LAB I	A	1.0	1.0	4.00		
PHYS	6A	INTRODUCTORY PHYSIC	A	3.0	3.0	12.00		
PHYS	6AL	INTRO EXPER PHYSICS	A	1.0	1.0	4.00		
		Quarterly Total:		18.0	18.0	68.00	3.78	Deans Honors
THRU F15		Total:		65.0	61.0	236.70	3.88	
2016 Winter Quarter Sophomore								
CHEM	6AL	ORGANIC CHEM LAB	A	3.0	3.0	12.00		
CHEM	109B	ORGANIC CHEMISTRY	A-	4.0	4.0	14.80		
COMM	1	INTRO COMMUNICATION	A	5.0	5.0	20.00		
EEMB	2	INTRO BIOLOGY II-EE	B	3.0	3.0	9.00		
MCDB	1B	INTRO BIOLOGY II--P	B-	3.0	3.0	8.10		
MCDB	1BL	INTRO BIOL LAB II	A	1.0	1.0	4.00		
		Quarterly Total:		19.0	19.0	67.90	3.57	
THRU W16		Total:		84.0	80.0	304.60	3.80	
2016 Spring Quarter Junior								
CHEM	6BL	ORGANIC CHEM LAB	B+	3.0	3.0	9.90		
COMM	88	COMM RESEARCH METH	A	5.0	5.0	20.00		
EEMB	3	INTRO BIOLOGY III	A+	3.0	3.0	12.00		
EEMB	3L	INTRO BIOL LAB III	A-	1.0	1.0	3.70		
INT	84ZA	INTRO HONS SEMINAR	A	2.0	2.0	8.00		
		Quarterly Total:		14.0	14.0	53.60	3.82	Deans Honors
THRU S16		Total:		98.0	94.0	358.20	3.81	
2016 Summer Session Junior								
COMM	145	MEDIA ENTERTAINMENT	A+	4.0	4.0	16.00		
		Quarterly Total:		4.0	4.0	16.00	4.00	
THRU M16		Total:		102.0	98.0	374.20	3.81	
2016 Fall Quarter Junior								
COMM	89	THEORIES OF COMM	A-	5.0	5.0	18.50		
MCDB	101A	MOLEC. GENETICS I	A	4.0	4.0	16.00		Course Honors
MCDB	151	NEUROBIOLOGY I	A	4.0	4.0	16.00		
WRIT	50	WRIT & RSRCH PROCESS	A	4.0	4.0	16.00		
		Quarterly Total:		17.0	17.0	66.50	3.91	Deans Honors
THRU F16		Total:		119.0	115.0	440.70	3.83	

CONTINUED TO PAGE 3

ISSUED TO:

Keon Zemoudeh

Anthony Schmid
University Registrar

UNIVERSITY OF CALIFORNIA SANTA BARBARA

University of California, Santa Barbara
Office of the Registrar, Santa Barbara, CA 93106-2015

PARCHMENT: 32930824

PRINTED: 02/20/21

OFFICIAL TRANSCRIPT

STUDENT NAME: KEON K ZEMOUDEH

PERM NUMBER: 760822

COURSE		TITLE	GRADE	COMPLETE UNITS	GPA UNITS	GRADE POINTS	GPA	
2017 Winter Quarter Senior								
CMPSC	8	INTRO TO COMP SCI	A	4.0	4.0	16.00		
MCDB	101B	MOLEC GENETICS II	B+	4.0	4.0	13.20		
MCDB	152	NEUROBIOLOGY II	A-	4.0	4.0	14.80		
PHYS	6B	INTRODUCTORY PHYSIC	A	3.0	3.0	12.00		
PHYS	6BL	INTRO EXPER PHYSICS	A-	1.0	1.0	3.70		
		Quarterly Total:		16.0	16.0	59.70	3.73	
THRU W17		Total:		135.0	131.0	500.40	3.81	
2017 Spring Quarter Senior								
EEMB	148	STREAM ECOLOGY	B+	4.0	4.0	13.20		
GLOBL	1	GLOBL HIS/CUL/IDEOL	P	4.0	0.0	0.00		
MCDB	134	GEN ANIMAL VIROLOGY	A-	4.0	4.0	14.80		
PHYS	6C	INTRODUCTORY PHYSIC	A+	3.0	3.0	12.00		
PHYS	6CL	INTRO EXPER PHYSICS	A	1.0	1.0	4.00		
		Quarterly Total:		16.0	12.0	44.00	3.66	
THRU S17		Total:		151.0	143.0	544.40	3.80	
2017 Fall Quarter Senior								
INT	84AB	INTRO HONS SEMINAR	A	2.0	2.0	8.00		
INT	184AC	HONORS SEMINAR	A-	2.0	2.0	7.40		
MCDB	101L	MOLEC GENETICS LAB	A+	4.0	4.0	16.00		
MCDB	111	HUMAN PHYSIOLOGY	B+	4.0	4.0	13.20		
		Quarterly Total:		12.0	12.0	44.60	3.71	
THRU F17		Total:		163.0	155.0	589.00	3.80	
2018 Winter Quarter Senior								
EEMB	131	PRIN OF EVOLUTION	A-	4.0	4.0	14.80		
ESS	130	SPORT ADMINISTRATN	A-	4.0	4.0	14.80		
INT	184AI	HONORS SEMINAR	A	2.0	2.0	8.00		
MCDB	112	DEVELOPMENTAL BIOL	A	4.0	4.0	16.00		Course Honors
MCDB	112H	DEV BIOL HONORS	A	1.0	1.0	4.00		Course Honors
		Quarterly Total:		15.0	15.0	57.60	3.84	Deans Honors
THRU W18		Total:		178.0	170.0	646.60	3.80	
2018 Spring Quarter Senior								
EEMB	103A	CALIF FLORA AND VEG	A-	4.0	4.0	14.80		
ES	1- 7A	ELEM BOAT & SAIL	P	0.5	0.0	0.00		
ES	1- 24B	INTERMEDIATE GOLF	P	0.5	0.0	0.00		
MCDB	153	DEVELOP NEUROBIO	A	4.0	4.0	16.00		
WRIT	107L	LEGAL WRITING	A	4.0	4.0	16.00		
		Quarterly Total:		13.0	12.0	46.80	3.90	Deans Honors
THRU S18		Total:		191.0	182.0	693.40	3.80	

CONTINUED TO PAGE 4

ISSUED TO:

Keon Zemoudeh

Anthony Schmid
University Registrar

UNIVERSITY OF CALIFORNIA SANTA BARBARA

University of California, Santa Barbara
Office of the Registrar, Santa Barbara, CA 93106-2015

PARCHMENT: 32930824

PRINTED: 02/20/21 PAGE: 4

OFFICIAL TRANSCRIPT

STUDENT NAME: KEON K ZEMOUDEH PERM NUMBER: 760822

	COMPLETE UNITS	GPA UNITS	GRADE POINTS	GPA
UC Credit Undergraduate Total:	191.0	182.0	693.40	3.80
TRANSFER Credit Undergraduate Total:	20.0			
ALL Credit Undergraduate Total:	211.0			

SCHOOL	ATTENDED FROM	ATTENDED THRU	ACCEPTED UNITS
ADVANCED PLACEMENT EXAMINATION	Spring 12	Spring 14	20.0

** END OF RECORD **

ISSUED TO:

Keon Zemoudeh

Anthony Schmid
University Registrar

UNIVERSITY OF CALIFORNIA • SANTA BARBARA
TRANSCRIPT GUIDE

UNITS OF CREDIT:
Until September 1966, credits were recorded as semester units. Since that time, the University of California, Santa Barbara has operated on a quarter calendar, with three quarters per academic year and an optional summer session. Each quarter has ten weeks of instruction at the rate of one unit for every three hours of student work required each week.

CURRENT GRADING SYSTEM:
The grades A, B, C, and D may be modified by plus (+) or minus (-) suffixes. Grade points for each unit are assigned as follows:

A+ = 4.0	A = 4.0	A- = 3.7
B+ = 3.3	B = 3.0	B- = 2.7
C+ = 2.3	C = 2.0	C- = 1.7
D+ = 1.3	D = 1.0	D- = 0.7

Grades of F, I, IP, P, NP, S, U and W = 0.0 grade points

Unit credit, but not grade-point credit, is assigned for P and S grades.

P = Passed (C or better)	Undergraduate Course Only
NP = Not Passed (C- or below)	Undergraduate Course Only
S = Satisfactory (B or better)	Graduate Course Only
U = Unsatisfactory (B- or below)	Graduate Course Only
I = Incomplete	
W = Withdrawal after established deadline	
IP = Grade to be assigned at the end of the final course in the sequence	

GOOD ACADEMIC STANDING:
A student is in good standing academically unless otherwise indicated.

TRANSFER CREDIT:
Only credit that is accepted by the University is shown on the transcripts of UCSB students. Credit from other UC campuses may be shown either by individual course records or as a unit summary by campus. Individual courses from schools outside of the UC system are not shown.

ADVANCED PLACEMENT CREDIT:
Examinations and the credits accepted for them are shown on the transcript in the same format and location as transfer credit.

COURSE NUMBERING SYSTEM:

1 - 99	Lower Division Courses
100 - 199	Upper Division Courses
200 - 299	Graduate Courses
300 - 399	Professional courses for teachers
400 & above	Other professional and graduate courses

REPEATED COURSES:
An undergraduate student may repeat only those courses for which an NP or letter grade of C- or lower is recorded. If the grade from a previous attempt had been included in the GPA calculations, its effect is then removed by a "repeat adjustment" up to a maximum of 16 units over the student's career.

ACCREDITATION:
Western Association of Schools and Colleges (WASC)

USC Gould School of Law

MARC E. BROWN
Lecturer in Law

May 23, 2021

Re: Keon Zemoudeh

To Whom it May Concern:

Keon Zemoudeh was one of ten students in my Patent Drafting and Prosecution class at USC Gould School of Law during the past Spring of 2021 semester. The class included two LLM students and another that had already passed the patent bar.

Keon performance in my class was exceptional. He received the highest score on our final exam and on every one of its six homework assignments! Here are examples of comments that I wrote on his written homework:

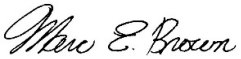
- Patent claims:
  - "Great work overall!"
  - "Nice clear and broad language with good target scope. I especially like how you did not specify the precise location of the valves to cover all embodiments."
  - "This is my favorite set of claims in the set!"
- Patent application:
  - "Excellent overall. Fantastic detail, clear, and lots of alternatives!"
  - "Great word choice"
  - "Great idea to include!"
- Response to office action
  - "Excellent presentation, including your citations to support and arguments"
  - "Nice careful and detailed work"
  - "Wow! I am so impressed that you know this rule!"
- Request for patent examiner interview:
  - "Excellent amendment!! Great strategy!"
- Summary of patent examiner interview:
  - "All excellent"

Keon was also the only student in my course that earned an A+. Indeed, I was so impressed with Keon's work that, at the end of the course, I volunteered to write him a letter of recommendation. Keon is the only student during my thirteen years of teaching this course that I ever volunteered such an offer.

University of Southern California
699 Exposition Boulevard, Los Angeles, California 90089-0071 • Tel: 818 986 4998 • mbrown@law.usc.edu

I understand that Keon now wants to clerk for a federal court that handles a significant number of patent cases. I highly recommend Keon for this position and feel confident that the court that is lucky enough to secure his services will be very pleased that it did so.

Yours very truly,



Marc E. Brown
Lecturer in Law
USC Gould School of Law
MBrown@law.usc.edu
(818) 986-4998

MEMORANDUM

To: Natalie Kouyoumdjian and Khoa Nguyen

From: Keon Zemoudeh

Date: November 19, 2018

Re: Philip Cerveau, Client-matter # 12.3456: Procedural unconscionability of an unlimited, exclusive license term under California law

---

Philip Cerveau, an Assistant Professor and software engineer, has hired us to determine whether he can challenge the enforceability of an "unlimited, exclusive" software-licensing agreement he made with VisionQuest, Inc., a start-up software-development company. Cerveau wanted to develop his software code independently after signing the agreement, but the unlimited, exclusive license term prohibited him from doing so. This memo addresses whether the unlimited, exclusive term in the agreement was procedurally unconscionable under California law. I only used California cases after 1979, I did not use cases involving adhesion contracts or arbitration clauses, I did not discuss TTA statutes or substantive unconscionability, and I assumed all facts to be true.

QUESTIONS PRESENTED

A. Was an unlimited, exclusive term in a software-licensing agreement oppressive for purposes of procedural unconscionability given that the licensor could have chosen to contact other companies, although the licensor was under significant economic pressure to buy insurance for his pregnant wife, and he lacked experience in forming license agreements?

B. Was an unlimited, exclusive term in a software-licensing agreement a surprise for purposes of procedural unconscionability given that the term was in a separate clause

that stood out from the agreement by a heading, although the licensee failed to direct the licensor's attention to a rare term that the licensee said was standard, and the licensor was unaware of his obligations under the agreement?

BRIEF ANSWERS/RECOMMENDATION

A. Probably no. The unlimited, exclusive term in the software-licensing agreement was probably not oppressive for purposes of procedural unconscionability because the licensor could have chosen to contact other companies, and the licensor successfully bargained for a royalty in the agreement.

B. Probably yes. The unlimited, exclusive term in the software-licensing agreement was probably a surprise for purposes of procedural unconscionability because the licensee failed to direct the licensor's attention to a rare term that the licensee said was standard, the licensor was unaware of his obligations, and the licensor was inexperienced with contracts.

My research suggests that Cerveau could probably demonstrate the procedural unconscionability of the unlimited, exclusive term successfully. If the term is also substantively unconscionable, I recommend that Cerveau file a lawsuit challenging the enforceability of the agreement.

STATEMENT OF FACTS

Philip Cerveau is a software engineer and an Assistant Professor at Gould University. When Cerveau was an unemployed

Ph.D. student in 2016, he signed a license agreement with VisionQuest, Inc., a start-up software-development company from California that was founded in 2008. The agreement allowed VisionQuest to develop and market devices using Cerveau's software code. Cerveau learned later that VisionQuest was charging high prices for the software platform they developed using his code. In turn, he hired our firm to determine whether he could challenge his license agreement with VisionQuest.

Cerveau received three degrees in the field of computer science. In 2015, two years before receiving his Ph.D., Cerveau wrote a code to facilitate secure communication across a wide variety of electronic devices. However, he did not have the resources to develop his code into a marketable commercial product. Thus, he made some calls and sent letters about the code to two big software-development companies without success.

Although those attempts to gain interest in his code were unsuccessful, an old friend connected Cerveau with Cheryl Glouton, the President and CEO of VisionQuest. VisionQuest had twenty employees and $10,000,000 in gross annual revenue when Cerveau signed the agreement. In a preliminary meeting, Glouton expressed interest in developing and marketing Cerveau's code. Her plan was to develop a reasonably priced software platform. However, she said that developing the code would be "a big risk," and it would be hard to convince her company to develop

Cerveau's code. In case Glouton chose to develop his code, Cerveau bargained for a royalty on VisionQuest's sales of the software platform.

At a second meeting, Glouton presented a license agreement to Cerveau. Glouton told Cerveau several times that it was a "standard" agreement. The agreement gave Cerveau an up-front payment of $10,000 and a 1% royalty in exchange for an unlimited, exclusive license over Cerveau's code. Glouton did not point out the unlimited, exclusive term to Cerveau. However, she said that Cerveau could consult an attorney and take a few days to review the agreement. Cerveau did not do so. He had just found out his wife was pregnant, and he needed the money to buy her health insurance. Instead, he only "glanced" at the agreement. He did not know what the unlimited, exclusive term meant and was unaware of his obligations under the contract. Afraid that Glouton might back out of the deal, Cerveau signed the agreement immediately.

The agreement itself was three-and-a-half pages long. It had numbered sections with headings in 12-point capital letters and sentences in 12-point regular case. The sections were each separated vertically by one row of space. The two-sentence, five-line section with the unlimited, exclusive term was labeled "GRANT OF LICENSE." The second sentence states: "This license is unlimited and exclusive, which means, among other things,

that Licensor cannot grant a license to any other company to develop, market, or otherwise use the Licensed Program."

After signing the agreement, Cerveau learned that VisionQuest was charging high prices for its software platform based on his code. Cerveau called Glouton and asked her to reconsider the price, but Glouton refused. Cerveau then learned that the unlimited, exclusive term barred him from developing his code independently. He also found out that the term is rare in license agreements.

DISCUSSION

Unconscionability is a defense to contract enforcement, and an unconscionable provision is unenforceable. Am. Software, Inc. v. Ali, 54 Cal. Rptr. 2d 477, 479 (Ct. App. 1996). Unconscionability has two elements——"procedural" and "substantive." Id. Procedural unconscionability focuses on the manner in which the agreement was negotiated, while substantive unconscionability focuses on the agreement's terms. Id. California courts require both procedural and substantive unconscionability, but a sliding scale applies. Id. at 479-80. In turn, a high degree of substantive unconscionability requires a lower degree of procedural unconscionability. Id. at 480.

The procedural element of unconscionability focuses on two factors: "oppression" and "surprise." Id. A finding of procedural unconscionability is not precluded if one of these

two factors is not met. See Ellis v. McKinnon Broad. Co., 23 Cal. Rptr. 2d 80, 84 (Ct. App. 1993).

A. Whether the Unlimited, Exclusive Term was Oppressive

Oppression refers to an inequality of bargaining power resulting in no meaningful choice for the weaker party. Am. Software, 54 Cal. Rptr. 2d at 480. In American Software, an employee sought commission on payments her employer received thirty days after she quit, contrary to a provision in her employment agreement. Id. at 479. The term was not oppressive because the employee was aware of the term, consulted counsel, and successfully negotiated for favorable terms on other provisions. Id. at 480. Thus, the employee had meaningful choice, and the provision was not oppressive. Id. Similarly, in Wayne v. Staples, Inc., 37 Cal. Rptr. 3d 544, 547 (Ct. App. 2006), a customer sued an office supplies retailer, alleging that the coverage prices for shipping were unconscionable. Customers could have chosen whether to purchase coverage, and they could have bought coverage elsewhere. Id. at 556. Moreover, customers could have shipped from other retailers. Id. Thus, there was meaningful choice and no oppression. Id.

The circumstances relevant to establishing oppression include: the amount of time a party has to consider the contract; the amount and type of pressure put on the party to sign; contract length; the education and experience of the

party; and whether the party reviewed the contract with an attorney. Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc., 182 Cal. Rptr. 3d 235, 248-49 (Ct. App. 2015). In Grand Prospect, an owner of a shopping center leased a vacant space to a clothing retailer. Id. at 240. The owner sued the retailer, alleging that a cotenancy provision was unconscionable. Id. The owner was under the usual economic pressure that commercial landlords experience when they have vacant spaces. Id. at 252. He also had a business degree and thirty years of experience with lease agreements, especially with those of the retailer. Id. at 251–252. Thus, the provision was not oppressive. Id. at 253. However, in Carboni v. Arrospide, 2 Cal. Rptr. 2d 845, 846 (Ct. App. 1991), a borrower secured a loan from a real estate broker at a 200% per year interest rate. The borrower was under emotional distress because he needed to pay for his parents' medical expenses. Id. at 850. It was impossible to obtain funds elsewhere because his loan was secured by a fourth deed of trust. Id. at 851. Thus, he was under significant economic pressure, and there was oppression. Id.

Here, there may have been oppression because Cerveau was under significant economic pressure when he signed the agreement. Unlike in Grand Prospect, in which the owner was under the usual economic pressure that landlords face, here, Cerveau was under serious, non-routine economic pressure to

purchase health insurance for his pregnant wife. Moreover, like in Carboni, in which the borrower had no other sources of funding for his parents' medical expenses, here, Cerveau had no other way to fund his wife's expenses. In turn, there may have been oppression because of Cerveau's economic vulnerability.

Moreover, there may have been oppression because Cerveau was not educated or experienced enough in forming license agreements. Unlike in Grand Prospect, in which the owner had a business background and thirty years of experience with leases, here, Cerveau was a computer science student who had not worked with license agreements. Cerveau was less experienced than Glouton was with licensing, suggesting there was oppression.

However, there was probably not oppression because Cerveau had meaningful choice. Like in American Software, in which an employee negotiated for favorable provisions, here, Cerveau bargained for a 1% royalty, suggesting he could have negotiated to revise the unlimited, exclusive term. Thus, Cerveau had enough bargaining power to establish meaningful choice. Similarly, like in Wayne, in which a customer could have shipped at other retailers, here, Cerveau could have contacted other start-up companies. Thus, Cerveau had meaningful choice to develop his software. Moreover, Cerveau could have applied for a university grant to develop the code himself, suggesting he

had other funding choices. In turn, Cerveau had meaningful choice, so there was probably not oppression.

B. Whether the Unlimited, Exclusive Term was a Surprise

Surprise involves the extent to which agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce the disputed terms. Kurashige v. Indian Dunes, Inc., 246 Cal. Rptr. 310, 313 (Ct. App. 1988). The drafting party bears the burden to show the other party knew of the disputed terms. Ellis, 23 Cal. Rptr. 2d at 84. In Kurashige, a dirtbike rider signed a release agreement that contained a capitalized heading in 10-point font to highlight several release clauses. 246 Cal. Rptr. at 311. The agreement also had warnings about riding in 17-point, red print. Id. When the dirtbike rider sued for injuries, there was no surprise because the clauses were not hidden in the agreement. Id. at 314.

A drafting party's failure to direct a non-drafting party's attention to a complex term may constitute surprise. A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 124 (Ct. App. 1982). In A & M Produce, a purchaser sued a manufacturer for malfunctioning farm equipment. Id. at 118. The equipment contract was long and preprinted. Id. at 124. It contained two disputed provisions in the middle of the back page, which the manufacturer only casually showed the purchaser. Id. Those provisions were slightly larger than most of the contract text.

Id. The manufacturer never directed the purchaser to read the provisions, suggesting there was surprise. Id. at 124–25.

There may not be surprise when a party is experienced in forming contracts and is aware of its contractual obligations. See Am. Software, 54 Cal. Rptr. 2d at 480. In American Software, an employee was experienced with similar legal agreements and had read her contract. Id. at 479-80. Thus, she understood and was aware of an unfavorable provision, and there was no surprise. Id. at 480. By contrast, in Ellis, a commission-forfeiture provision in an employee's contract was a surprise because the employee was unaware of the provision at signing. 23 Cal. Rptr. 2d at 84. The employee did not read the contract closely and was told it was a "mere formality." Id.

Here, there may not have been surprise because the license term was in a clause that stood out in the agreement. Like the agreement in Kurashige, which had 10-point capital letters highlighting the release clauses, VisionQuest's agreement used 12-point capital letters ("GRANT OF LICENSE") to designate the section with the unlimited, exclusive license term. The capital letters brought attention to the clause, suggesting that the term within it was not hidden and that there was no surprise. Moreover, each clause in the agreement was numbered, suggesting that VisionQuest organized the agreement to make the terms more visible to the reader.

However, there probably was surprise because Glouton failed to direct Cerveau's attention to the unlimited, exclusive term. Like in A & M Produce, in which the manufacturer never suggested that the purchaser read the terms on the back of the contract, here, Glouton never pointed out the unlimited, exclusive term to Cerveau, suggesting Cerveau was probably surprised to find out about the term after signing.

Moreover, there was probably surprise because Cerveau was not experienced with contracts or aware of his contractual obligations. Unlike the employee in American Software, who was experienced with legal agreements and read her employment contract, Cerveau had never worked with licensing agreements and only glanced at his contract. Thus, there was probably surprise because Cerveau was unaware that he was prohibited from developing his own code. Additionally, like in Ellis, in which an employee did not read a forfeiture provision closely and was told that the contract was a "mere formality," here, Cerveau did not read the unlimited, exclusive term and was told that the agreement was "standard." Thus, Cerveau was probably surprised to find the term included in the agreement.

CONCLUSION

There was probably not oppression, but there probably was surprise. Thus, the unlimited, exclusive license term was probably procedurally unconscionable.

Applicant Details

First Name	**Josh**
Last Name	**Zhao**
Citizenship Status	**U. S. Citizen**
Email Address	**joshzhao@umich.edu**
Address	**Address** **Street** **551 South State Street** **City** **Ann Arbor** **State/Territory** **Michigan** **Zip** **48109** **Country** **United States**
Contact Phone Number	**9896004499**

Applicant Education

BA/BS From	**Michigan State University**
Date of BA/BS	**May 2019**
JD/LLB From	**The University of Michigan Law School** **http://www.law.umich.edu/currentstudents/careerservices**
Date of JD/LLB	**May 6, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Michigan Technology Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Campbell Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

References

Professor David Santacroce: dasanta@umich.edu, (734) 763-4319
Professor Mark Osbeck: mosbeck@umich.edu, (734) 764-9337
Brett DeGroff: brettdegroff@gmail.com, (517) 763-8560

This applicant has certified that all data entered in this profile and any application documents are true and correct.

April 08, 2022

The Honorable Elizabeth Hanes
Spottswood W. Robinson III & Robert R. Merhige,
Jr., U.S. Courthouse
701 East Broad Street, 5th Floor
Richmond, VA 23219

Dear Judge Hanes:

I am a third-year law student at the University of Michigan Law School, and I am interested in a clerkship in your chambers for the 2022-23 term.

I have been interested in a clerkship ever since I worked at the Michigan Supreme Court since my 1L summer as a judicial intern for Justice Cavanagh. My assignments focused on drafting memos analyzing and summarizing cases on a range of issues. As a future litigator, I enjoyed the opportunity to view cases from a judge's perspective as well as the opportunity to work on a variety of issues within the law. Additionally, I found the experience to be extremely beneficial for refining my writing and legal analysis skills. During my time in law school, I worked in the Civil-Criminal Litigation Clinic where I drafted pleadings on behalf of clients in landlord-tenant cases and represented clients in court hearings. I also got the opportunity to draft briefs in a criminal appeal. My clinical work provided me valuable litigation experience while also fostering my ability to prosper in a fast-paced environment. Additionally, this environment emphasized a high attention to detail, which has helped me succeed in law school and I believe will be helpful during my clerkship experience. Last summer, I worked at the Ann Arbor City Attorney's Office where I drafted memos to advise City Council on various issues that could affect Ann Arbor in litigation such as qualified immunity, telecommunications regulation and Title VII. I greatly enjoyed the summer and it has helped me further develop my research, writing and legal analysis skills in preparation for post-graduation opportunities like this clerkship.

I have attached my resume, transcript, and a writing sample for your review.

Thank you for your time and consideration.

Sincerely,
Josh Zhao

Josh Zhao

551 South State Street, Ann Arbor, MI 48109
989-600-4499 • joshzhao@umich.edu

EDUCATION

UNIVERSITY OF MICHIGAN LAW SCHOOL — Ann Arbor, MI
Juris Doctor — Expected May 2022
Journal: Michigan Technology Law Review, *Managing Executive Editor* (Vol. 28), *Executive Editor* (Vol. 27.2)
Activities: Campbell Moot Court Competition, *Competitor* (2021-22), *Quarterfinalist* (2020-21), *Marshal* (2019-20)
1L Oral Advocacy Competition, *Judge* (2021, 2022), *Competitor* (2020)
Corporate Counseling Competition, *Prize Winner* (2019)
Asian Pacific American Law Students Association
First Generation Law Students
Wolverine Street Law

MICHIGAN STATE UNIVERSITY — East Lansing, MI
Bachelor of Arts in Finance, *High Honor* — May 2019
Additional Major in Economics
Honors: Honors College, Beta Gamma Sigma, Phi Kappa Phi

EXPERIENCE

ANN ARBOR CITY ATTORNEY'S OFFICE — Ann Arbor, MI
Legal Intern — May – July 2021

- Attended meetings and presentations discussing various aspects of legal issues that municipalities face such as zoning, FOIA requests and various matters involving the City Attorney.
- Researched case law, statutes, and policy related to constitutional and municipal law.
- Wrote memos to advise city council on potential litigation and liability in areas such as qualified immunity, Title VII, vicarious liability, First Amendment, and telecommunications.

UNIVERSITY OF MICHIGAN CIVIL-CRIMINAL LITIGATION CLINIC — Ann Arbor, MI
Student Attorney — August – December 2020

- Drafted pleadings on behalf of indigent clients in landlord-tenant cases.
- Drafted briefs in appeal of a criminal conviction on insufficiency of evidence grounds.
- Represented tenants in pre-trial hearings and in negotiations with opposing counsel.
- Analyzed tenant lease agreements to ensure landlords treated tenants fairly and to prevent eviction during COVID-19.
- Aided tenants in settling their cases without going to trial, avoiding a potential verdict that could preclude them from attaining subsidized housing in the future.

MICHIGAN SUPREME COURT — Lansing, MI
Judicial Intern for Justice Megan K. Cavanagh — May – July 2020

- Drafted memos analyzing and summarizing cases for Justice Cavanagh and gave a recommendation on each case whether to hold for oral argument or deny leave to appeal.
- Analyzed cases dealing with a range of issues such as ineffective assistance of counsel, sentencing guidelines, sufficiency of evidence, summary disposition, property rights and sovereign immunity.
- Studied case reports prepared by commissioners along with lower court opinions for cases being appealed to the Michigan Supreme Court to help prepare memos.

ADDITIONAL

Interests: College football, March Madness college basketball, playing chess, trivia competitions/fun facts

Control No: E187682801 Issue Date: 01/21/2022 Page 1

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Zhao,Joshua Wentao
Student#: 81655710

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2019	**(September 03, 2019 To December 20, 2019)**							
LAW	510	003	Civil Procedure	Nicholas Bagley	4.00	4.00	4.00	B+
LAW	530	004	Criminal Law	David Uhlmann	4.00	4.00	4.00	B+
LAW	580	004	Torts	Margo Schlanger	4.00	4.00	4.00	B
LAW	593	015	Legal Practice Skills I	Mark Osbeck he-him-his	2.00		2.00	S
LAW	598	015	Legal Pract:Writing & Analysis	Mark Osbeck he-him-his	1.00		1.00	S
Term Total				**GPA: 3.200**	**15.00**	**12.00**	**15.00**	
Cumulative Total				**GPA: 3.200**		**12.00**	**15.00**	
Winter 2020	**(January 15, 2020 To May 07, 2020)**							
During this term, a global pandemic required significant changes to course delivery. All courses used mandatory Pass/Fail grading. Consequently, honors were not awarded for 1L Legal Practice.								
LAW	520	001	Contracts	Albert Choi	4.00		4.00	PS
LAW	540	005	Introduction to Constitutional Law	Julian Davis Mortenson	4.00		4.00	PS
LAW	594	015	Legal Practice Skills II	Mark Osbeck he-him-his	2.00		2.00	PS
LAW	791	001	Environmental Crimes	David Uhlmann	3.00		3.00	PS
Term Total					**13.00**		**13.00**	
Cumulative Total				**GPA: 3.200**		**12.00**	**28.00**	

Continued next page >

Control No: E187682801 Issue Date: 01/21/2022 Page 2

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Zhao,Joshua Wentao
Student#: 81655710

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2020	**(August 31, 2020 To December 14, 2020)**							
LAW	693	001	Jurisdiction and Choice Of Law	Mathias Reimann	4.00		4.00	P
LAW	723	001	Corporate Lawyer: Law & Ethics	Vikramaditya Khanna	4.00	4.00	4.00	B+
LAW	920	001	Civil-Criminal Litigation Clnc	David Santacroce Allison Freedman Kimberly Thomas	4.00	4.00	4.00	A-
LAW	921	001	Civil-Criminal Litig Clnc Sem	David Santacroce Allison Freedman Kimberly Thomas	3.00	3.00	3.00	A-
Term Total				**GPA: 3.554**	**15.00**	**11.00**	**15.00**	
Cumulative Total				**GPA: 3.369**		**23.00**	**43.00**	
Winter 2021	**(January 19, 2021 To May 06, 2021)**							
LAW	669	001	Evidence	Eve Primus	4.00	4.00	4.00	B+
LAW	716	001	Complex Litigation	Maureen Carroll	4.00	4.00	4.00	B+
LAW	731	001	Legal Ethics and Professional Responsibility	Bob Hirshon	2.00	2.00	2.00	A-
LAW	740	001	Tribal Law	Matthew Fletcher	3.00	3.00	3.00	B+
Term Total				**GPA: 3.361**	**13.00**	**13.00**	**13.00**	
Cumulative Total				**GPA: 3.366**		**36.00**	**56.00**	

Continued next page >

Control No: E187682801 Issue Date: 01/21/2022 Page 3

The University of Michigan Law School

Cumulative Grade Report and Academic Record

Name: Zhao,Joshua Wentao
Student#: 81655710

University Registrar

Subject	Course Number	Section Number	Course Title	Instructor	Load Hours	Graded Hours	Credit Towards Program	Grade
Fall 2021	**(August 30, 2021 To December 17, 2021)**							
LAW	435	001	Law Firm Careers/Evolv Prof	Bob Hirshon	3.00	3.00	3.00	A
LAW	569	001	Legislation and Regulation	Daniel Deacon	4.00		4.00	P
LAW	634	001	Water Wars/Great Lakes	Andrew Buchsbaum	3.00	3.00	3.00	B+
LAW	637	001	Bankruptcy	John Pottow	4.00	4.00	4.00	B+
Term Total				**GPA: 3.510**	**14.00**	**10.00**	**14.00**	
Cumulative Total				**GPA: 3.397**		**46.00**	**70.00**	
Winter 2022	**(January 12, 2022 To May 05, 2022)**							
Elections as of:	01/21/2022							
LAW	677	001	Federal Courts	Daniel Deacon	4.00			
LAW	705	001	Mergers and Acquisitions	Albert Choi	4.00			
LAW	737	001	Higher Education Law	Jack Bernard	4.00			
LAW	897	001	Artificial Intell and the Law	Nicholson Price	2.00			

End of Transcript
Total Number of Pages 3

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MICHIGAN STATE UNIVERSITY

OFFICIAL ACADEMIC TRANSCRIPT
ISSUED TO STUDENT

PRINTED: 11/08/19
PAGE: 01 OF 01

UIC:7910067959

ZHAO, JOSHUA WENTAO

STUDENT ID: A52418238

COURSE	TITLE	CRS	GRADE	S/R	H
	PREVIOUS/TRANSFER INSTITUTIONS				
HERBERT HENRY DOW HIGH SCHOOL	ATTENDED: 09/11 - 06/15				
MIDLAND MI					
UNDERGRADUATE CREDIT					
ADVANCED PLACEMENT					
	MSU SEM CREDITS ACCEPTED: 23.00				
UNDERGRADUATE CREDIT					
INTERNATIONAL BACCALAUREATE					
	MSU SEM CREDITS ACCEPTED: 8.00				
UNDERGRADUATE CREDIT					
	COURSE INFORMATION				
FALL SEMESTER 2015	09/02/15 - 12/18/15				
ACC 201	PRINCIPLES OF FINANCIAL ACCT	3	4.0		
BUS 170	STARTUP: BUSINESS MODEL DEVELO	1	4.0		
EC 201	INTRODUCTION TO MICROECONOMICS	3	4.0		
PSY 235	SOCIAL PSYCHOLOGY	3	4.0		
WRA 195H	WRITING: MAJOR TOP AMER THGHT	4	4.0		H
CUM CREDITS : 45.0	CUM GPA : 4.0000				
DEAN'S LIST					
SPRING SEMESTER 2016	01/11/16 - 05/06/16				
ACC 202	PRINCIPLES OF MANAGEMENT ACCT	3	4.0		
BUS 250	BUSINESS COMMUNICATIONS	3	4.0		
EC 202	INTRODUCTION TO MACROECONOMICS	3	4.0		
GBL 295	LAW, POLICY AND ETHICS	3	4.0		
PLS 170	INTRO TO POLITICAL PHILOSOPHY	3	3.0		H
CUM CREDITS : 60.0	CUM GPA : 3.8965				
DEAN'S LIST					
FALL SEMESTER 2016	08/31/16 - 12/16/16				
EC 340	SURVEY OF INTERNTL ECONOMICS	3	4.0		
FI 311H	FINANCIAL MANAGEMENT	3	3.5		H
FI 312	INTRODUCTION TO INVESTMENTS	3	4.0		
SCM 303	INTRODUCTION SUPPLY CHAIN MGT	3	4.0		H
STT 315	INTRO PROB & STAT FOR BUSINESS	3	4.0		
CUM CREDITS : 75.0	CUM GPA : 3.8977				
DEAN'S LIST					
SPRING SEMESTER 2017	01/09/17 - 05/05/17				
ACC 305	INTERMEDIATE ACCT FINANCE MAJR	3	4.0		
FI 414	ADVANCED BUSINESS FINANCE (W)	3	4.0		
ITM 209	BUS ANALYTICS & INFO SYSTEMS	3	4.0		
MGT 315	MANAGING HUMAN RESOURCES	3	4.0		
MKT 317	QUANTITATIVE BUSINESS RES METH	3	4.0		H
CUM CREDITS : 90.0	CUM GPA : 3.9237				
DEAN'S LIST					
FALL SEMESTER 2017	08/30/17 - 12/15/17				
EC 301	INTERMEDIATE MICROECONOMICS	3	4.0		
FI 413	MGT OF FINANCIAL INSTITUTIONS	3	4.0		
FI 473	DEBT AND MONEY MARKETS	3	4.0		H
MGT 409	BUSINESS POL & STRATEGIC MGT	3	4.0		
MKT 300	MANAGERIAL MARKETING	3	4.0		
CUM CREDITS : 105.0	CUM GPA : 3.9391				
DEAN'S LIST					
----------END OF COLUMN----------					

COURSE	TITLE	CRS	GRADE	S/R	H
SPRING SEMESTER 2018	01/08/18 - 05/04/18				
EC 302	INTERMEDIATE MACROECONOMICS	3	4.0		
EC 380	LABOR RELAT & LABOR MARKET POL	3	4.0		
EC 401	ADVANCED MICROECONOMICS	3	4.0		
FI 451	INTERNTL FINANCIAL MANAGEMENT	3	4.0		H
CUM CREDITS : 117.0	CUM GPA : 3.9476				
DEAN'S LIST					
FALL SEMESTER 2018	08/29/18 - 12/14/18				
EC 335	TAXES, GOVERN SPEND & PUB POL	3	4.0		
EC 420	INTRO TO ECONOMETRIC METHODS	3	4.0		
EC 441	INTERNATIONAL FINANCE (W)	3	4.0		
EC 491	ADVANCED TOPICS IN ECONOMICS	3	4.0		H
CUM CREDITS : 129.0	CUM GPA : 3.9540				
DEAN'S LIST					
SPRING SEMESTER 2019	01/07/19 - 05/03/19				
PHY 231C	INTRODUCTORY PHYSICS I	3	4.0		
CUM CREDITS : 132.0	CUM GPA : 3.9554				
BACHELOR OF ARTS	GRANTED: 05/03/19				
MAJOR:	FINANCE				
COLLEGE:	ELI BROAD COLLEGE OF BUSINESS				
	WITH HIGH HONOR				
	MEMBER OF THE HONORS COLLEGE				
ADDITIONAL MAJOR UNDERGRADUATE	GRANTED: 05/03/19				
MAJOR:	ECONOMICS				
COLLEGE:	SOCIAL SCIENCE				
----------NO ENTRIES BELOW THIS LINE----------					

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Steven J. Shablin
University Registrar

MICHIGAN STATE UNIVERSITY

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Michigan State University is a member of the Association of Public and Land-grant Universities, Association of American Universities, American Council on Education, American Council of Learned Societies, Association of Graduate Schools, Council of Graduate Schools, Committee on Institutional Cooperation, and International Association of Universities. The University has been accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools, 30 North LaSalle Street, Chicago, Illinois 60602-2504, (312)263-0456, www.ncahigherlearningcommission.org. Some individual programs, schools, and colleges have been recognized by the accrediting agencies in their respective fields. For a list, visit www.opb.msu.edu, select "Strategic Planning" and then "Agencies that Accredit MSU."

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Calendar

The University offers instruction throughout the year during the fall semester, spring semester and summer sessions. Academic calendars are available at www.reg.msu.edu.

Credits

Effective Fall 1992 courses at Michigan State University are offered on a semester basis. One credit is equivalent to one instructor-student contact hour per week per semester plus two hours of study per contact hour; OR two hours of laboratory contact hours per week per semester, plus one additional hour spent in report writing and study; or other combinations of contact and study hours which constitute an equivalent of these experiences. Prior to Fall 1992 courses at Michigan State University were offered on a quarter basis.

To convert to quarter credits, the semester credits should be multiplied by 3/2.

Course Numbering System

001-099 – Non-Credit and Institute of Agricultural Technology Courses
100-299 – Undergraduate Courses
300-499 – Advanced Undergraduate Courses
500-599 – Graduate Courses prior to 1960
500-699 – Graduate – Professional Courses
800-899 – Graduate Courses
900-999 – Advanced Graduate Courses

Honors

An "H" in the Honors column indicates an honors course, honors section of a course, or the student took a non-honors course as honors. The latter indicates additional work was completed beyond normal requirements.

Grading System

The minimum cumulative grade-point average required for graduation is a 2.0 for undergraduate students and 3.0 for graduate students.

The Numerical System: 4.0, 3.5, 3.0, 2.5, 2.0, 1.5, 1.0, 0.0 – Credit is awarded for the following minimum levels – 1.0 for undergraduate students and 2.0 for graduate students. However, all grades are counted in the calculation of the grade-point average.

The Credit-No Credit System: CR-CREDIT – Credit was granted and represents a level of performance equivalent to or above the grade-point average required for graduation. NC-NO CREDIT – No credit was granted and represents a level of performance below the grade-point average required for graduation.

The Pass-No Grade System: P-PASS – Credit was granted and the student achieved a level of performance judged to be satisfactory by the instructor. N-NO GRADE – No credit was granted and the student did not achieve a level of performance judged satisfactory by the instructor.

Other Symbols Used: W-WITHDREW; V-VISITOR; U–UNFINISHED, I-INCOMPLETE; DF-DEFERRED; ET-EXTENSION; NGR-NO GRADE REPORTED; CP-CONDITIONAL PASS; & LDR-LATE DROP.

Grading Systems prior to Fall 1988: Please visit www.reg.msu.edu/transcripts.

Grade Point Average (GPA)

To compute the grade-point average for a semester, multiply the numerical grade by the number of credits for the course to obtain the total grade points. Then divide the total grade points for the semester by the total credits for the semester.

The minimum grade-point average required for graduation is 2.0 for undergraduate students and 3.0 for graduate students.

Courses in which P, I, N, DF, W, ET, CP, CR, NC, U or V have been received do not affect the grade-point average.

Grade Point systems prior to Summer 1972: Please visit www.reg.msu.edu/transcripts.

Repeated Courses

A course repeated is indicated in one of two ways:

1. By an R (Repeat) to the right of the "Descriptive Title", or

2. by an R (Repeat) in the SR column. In this case, you will also see an S (Superseded) in the SR column indicating the course being repeated.

For both formats term credit and grade-point average (GPA) totals are not adjusted for repeats in the term of the superseded course. The summary totals for the level of the student are adjusted to include only the last entry.

Withdrawal

A withdrawal from the University occurs when a student drops all courses within a semester. A student may voluntarily withdraw from the University prior to the end of the twelfth week of a semester or within the first 6/7 of the duration of the student's enrollment in a non-standard term of instruction (calculated in weekdays). Withdrawal is not permitted after these deadlines.

Courses in which the student is enrolled are deleted from the official record if the official voluntary withdrawal is before the middle of the term of instruction. If the official voluntary withdrawal is after the middle of the term of instruction, symbols are assigned by instructors to courses in which the student was enrolled as follows: W (no grade) to indicate passing or no basis for grade regardless of the grading system under which the student is enrolled, N to indicate failing in a course authorized for P-N grading, or 0.0 to indicate failing in a course authorized for numeric grading.

MSU is an affirmative-action, equal-opportunity employer.

Writing Sample Josh Zhao

The following is an advisory legal memo that I drafted for the City Attorney as a part of my internship at the Ann Arbor City Attorney's Office. I was asked to analyze the legal liability Ann Arbor could face regarding potential Title VII/ELCRA and defamation claims against a commissioner made by a governmental agency employee who is a public official. I wrote the entirety of this legal memo and conducted all legal research involved. All confidential information has been removed.

Issue:

An employee of an Agency has complained about false statements made by a member of a government commission (Commission thereafter). Human Resources found the complaint to be valid. However, it is not entirely clear how to address or deal with this situation. Commission is established by City Council. Under employment law, refusing to act against even a third party who is harassing an employee (for example based on race or sex) creates liability for the City. What is the liability for the City if a volunteer commissioner harasses an employee, and the City does not take prompt remedial action? How much leeway is there when it is opinion versus a false statement?

Short Answer:

It is highly likely there is not a Title VII/ELCRA claim present since the complainant's assertation that he believes that he was potentially targeted due to his race does not alone support a cause of action without more evidence. The Commissioner's comments, while potentially defamatory, do not touch on a protected classification. Furthermore, the Commissioner's disparaging comments about other employees of the Agency and the Agency in the past, weigh against her defamation likely being racially motivated. Rather, she may be motivated by a general dislike of that agency.

The complainant does have a potential defamation claim, but it is defamation by implication, and he must prove that the false implication was directly implied and that a reasonable person would believe the implication to be actual fact. Since complainant is a public official, defamation requires proof of actual malice. Additionally, Commissioner might be entitled to qualified immunity as a member of Commission and her statements could be interpreted as given within the scope of her serving on Commission. However, the

Commissioner must show that her actions were done in good faith and not with malice to be entitled to qualified immunity, which is unlikely considering Human Resources' determination against her. The Commissioner is likely implying that the wife of the complainant will delay FOIA releases if she is annoyed, but the Commissioner does not necessarily imply that the complainant would tell his wife to do so or that the complainant plays a role. The complainant bears the burden of proving that Commissioner was not warned about filing too many FOIA requests and that the complainant's wife's potential annoyance would not affect her job duties. Human Resources' finding that complainant's complaint is valid supports his claim, but it is unclear if that would be sufficient to rise to a legal finding of actual malice because it does not indicate that the Commissioner necessarily had serious doubts about the truth of the statement when she made it even though the statements may qualify as negligent.

Even if there is a defamation claim, City is not vicariously liable because City has no control over the Commissioner's actions. City Council members are likely not directly liable due to qualified immunity since appointing a commissioner is within the authority of council members and is a function of City Council. There is no indication that the appointment of Member was reckless enough to be grossly negligent or was the proximate cause of the defamation. Even if the Member is considered a government employee, City Council is not vicariously liable for the intentional torts of employees so City Council would not be held vicariously liable for the Member's defamation.

City Council can argue that the Member's statements violated the mission of Commission which creates a "for cause" reason for removal. The Member likely does not have a First Amendment claim if she is removed because she made her statements in an official capacity. Alternatively, even if she manages to show that she made her statements as a private citizen, her